SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 817

SUPERINTENDENT FIVE CIVILIZED TRIBES, FOR SANDY FOX, CREEK No. 1263, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

INDEX

	Original	Print
Proceedings in U. S. C. C. A., Tenth Circuit	A	1
Caption (omitted in printing)	A	
Proceedings before United States Board of Tax Appeals	1	1
Docket entries and appearances	1	1
Petition	2	2
Exhibit A—Notice of deficiency	4	4
Amended petition	6	6
Answer to amended petition	9	8
Stipulation of facts	9	9
Opinion, Black, M.	11	11
Decision	19	18
Petition for review and assignments of error	19	18
Notice of petition for review	22	21
Designation of record	22	21
Clerk's certificate (omitted in printing)	23	
Order of submission	25	22
Opinion, McDermott, J.	25	23
Judgment	34	32
Clerk's note re mandate	34	33
Clerk's certificate (omitted in printing)	35	
Order allowing certiorari	36	33

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[fols. a & b] [Caption omitted]

[fol. 1]

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 66375

SUPERINTENDENT FIVE CIVILIZED TRIBES, FOR SANDY FOX, CREEK NO. 1263, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appearances:

For Taxpayers: F. M. Goodwin, Esq., T. J. Reilly, Esq.
For Commissioner: B. M. Coon, Esq.

DOCKET ENTRIES

1932.

May 26. Petition received and filed. Taxpayer notified. (Fee paid).

May 26. Copy of petition served on General Counsel.

Jun. 20. Amended petition filed by taxpayer. 6/21/32 copy served.

Jul. 26. Answer to amended petition filed by General Counsel.

Sep. 7. Copy of answer served on taxpayer. General Calendar.

Sep. 30. Hearing set Dec. 13, 1932.

Dec. 13. Hearing had before Mr. Seawell, Div. 4. Referred to Mr. Black. Submitted on merits. Stipulation of facts filed. Petitioner's brief due in 30 days, reply 15 days. Respondent's brief due in 60 days. Ordered submitted on record and stipulation.

Dec. 21. Transcript of hearing December 13, 1932, filed.

1933.

Jan. 12. Brief filed by taxpayer.
Feb. 11. Motion for extension to Feb. 28, 1933, to file brief filed by General Counsel. 2/11/33 granted.
Feb. 28. Brief filed by General Counsel.

[fol. 2]

Mar. 13. Reply brief filed by taxpayer. 3/14/33 copy served.
Apr. 4. Memorandum filed by General Counsel.
Dec. 26. Opinion rendered, Mr. Black, Div. 15. Decision will be entered for the respondent.
Dec. 29. Decision entered, Div. 15, Mr. Black.

1934.

Jan. 27. Petition for review by U. S. Circuit Court of Appeals (10) with assignments of error filed by taxpayer.
Jan. 27. Proof of service filed by taxpayer.
Jan. 27. Præcipe with proof of service thereon filed.

BEFORE U. S. BOARD OF TAX APPEALS

PETITION—Filed May 26, 1932

The above named petitioner, hereby petitions for a redetermination of the deficiency as set forth by the Commissioner of Internal Revenue in his notice of deficiency dated March 29, 1932, symbols IT:AR:E-1 RCC-60D, and as a basis of this proceeding alleges as follows:

1. The said notice of deficiency (a copy of which is attached hereto and marked Exhibit A) is dated March 29, 1932. The petitioner has no knowledge as to the date it was mailed.

2. The taxes in controversy are income taxes for the calendar year 1929 in the sum of $269.59.

3. The determination of taxes as set forth in the said notice of deficiency is based upon the following errors:

(a) The Commissioner erred in including as income for the year 1929 an amount of $3,117.50 received as interest on a refund of income tax during the year 1929.

(b) The Commissioner erred in determining any deficiency against this taxpayer for the year 1929, as such determination is barred by the statute of limitations.

(c) The Commissioner erred in exacting any taxes from this petitioner for the year 1929.

[fol. 3] 4. The facts upon which the petitioner relies as a basis of this proceeding are:

(a) During the year 1929 the Commissioner determined that the petitioner was not subject to the Federal Income Tax laws and accordingly refunded sums of taxes which he determined to be illegally paid. In accordance with law, interest was refunded on these illegal payments in the amount of $3,117.50; this amount being received during the year 1929. The Commissioner has erroneously determined that this interest is subject to Federal Income Tax.

(b) The return of the petitioner for the year 1929 was filed and taxes paid on March 28, 1930. As the deficiency letter is dated March 29, 1932, any proposed deficiency is barred by the statute of limitations.

(c) Petitioner is a ward of the United States, being a member of the Creek Nation or Tribe of Indians, being enrolled opposite Creek Roll No. 1263. His property both real and personal is under the control of the United States, being under the direct supervision of the Superintendent of the Five Civilized Tribes, and under the direction and supervision of the Secretary of the Interior. The income from his allotment is received and held in trust by the said Superintendent and invested by him under the direction of the Secretary of the Interior; and the income interest upon such investments is likewise received and held by said superintendent as part of his restricted funds and property. Accordingly petitioner erroneously paid an income tax for the year 1929 in the amount of $102.59.

Wherefore, it is prayed that the Board hear this proceeding and determine.

(a) That the Commissioner erroneously included as income for the year 1929 interest received in the amount of $3,117.50.

(b) That any assessment for the year 1929 is barred by the statute of limitations.

(c) That petitioner is not subject to the Federal Income Tax Law for the year 1929.

[fol. 4] (d) For such other and further relief as the Board may deem meet and proper in the premises.

F. M. Goodwin, Jay W. Whitney, Thomas J. Reilly, Attorneys for Petitioner, Mills Building, Washington, D. C.

CITY OF WASHINGTON,
District of Columbia, ss:

F. M. Goodwin, Jay W. Whitney, and Thomas J. Reilly, state that they are attorneys duly authorized to represent the above named taxpayer; that they have prepared the above named petition and believe the facts stated therein are true; that they have just been recently employed by the Interior Department to represent this petitioner and due to insufficient time have not had this petition verified; that they respectfully request that the Board accept this petition in order to protect the taxpayer's rights, and state that an amended petition will be filed in accordance with the Board's rules or order.

F. M. Goodwin, Jay W. Whitney, Thomas J. Reilly,

EXHIBIT "A" TO PETITION

NP-2-28.

Treasury Department

Office of Commissioner of Internal Revenue

Washington, March 29, 1932.

Superintendent Five Civilized Tribes, for Sandy Fox, Creek No. 1263, Muskogee, Okla.

SIR: You are advised that the determination of your tax liability for the year (x) 1929 discloses a deficiency of $167.00, as shown in the statement attached.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may [fol. 5] petition the United States Board of Tax Appeals for a determination of your tax liability.

However, If You Do Not Desire to Petition, you are requested to execute the enclosed agreement form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this agreement will expedite the closing of your return (x) by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the enclosed agreement, or on the date assessment is made, whichever is earlier; Whereas If No Agreement Is Filed, interest will accumulate to the date of assessement of the deficiency.

Respectfully, David Burnet, Commissioner, by J. C. Wilmer, Deputy Commissioner.

Enclosures: Statement Form 882, Form 870.
627M

Statement

IT: AR:E-1, RCC-60D.

In re: Superintendent, Five Civilized Tribes, For Sandy Fox, Creek No. 1263, Muskogee, Okla.

Tax Liability

Year	Tax Liability	Tax Assessed	Deficiency
1929	$269.59	$102.50	$167.00

The records of this office disclosed that you received $3,117.50 in the form of interest on a refund of income tax during the year 1929. Interest paid on such refund is taxable income for the year in which received. Inasmuch as this office is unable to identify this item in your return, the amount has been included resulting in a deficiency of $167.00.

Net income reported on return		$16,149.17
Add:		
Interest		3,117.50
Adjusted net income		$19,266.67
[fol. 6] Less:		
Interest on Liberty bonds	$8,351.75	
Personal exemption	3,500.00	
Credit for dependents	400.00	$12,251.75
Balance subject to normal tax		$7,014.92
Normal tax at ½% on $4,000.00		20.00
Normal tax at 2% on $3,014.92		60.30
Surtax on $19,266.67		190.67
Total		$270.97
Less:		
Earned income credit		1.38
Correct tax liability		$269.59
Tax assessed		102.59
Deficiency		$167.00

Statement

Superintendent, Five Civilized Tribes, For Sandy Fox, Creek No. 1263.

You were advised in office letter dated February 25, 1932, that it would be necessary to hold any conference in Washington, D. C., that might be desired with regard to the proposed adjustment before March 10, 1932. Inasmuch as this period has expired and no request has been received, this formal notice of deficiency is issued.

Before U. S. Board of Tax Appeals

Amended Petition—Filed June 20, 1932

The above named petitioner, hereby petitions for a redetermination of the deficiency as set forth by the Com-

missioner of Internal Revenue in his notice of deficiency dated March 29, 1932, symbols IT:AR:E-1 RCC-60D, and as a basis of this proceeding alleges as follows:

1. The said notice of deficiency (a copy of which, marked Exhibit A, is attached to the original petition) is dated March 29, 1932. The petitioner has no knowledge as to the date it was mailed.

[fol. 7] 2. The taxes in controversy are income taxes for the calendar year 1929 in the sum of $269.59.

3. The determination of taxes as set forth in the said notice of deficiency is based upon the following errors:

(a) The Commissioner erred in including as income for the year 1929 an amount of $3,117.50 received as interest on a refund of income tax during the year 1929.

(b) The Commissioner erred in exacting any taxes from this petitioner for the year 1929.

4. The facts upon which the petitioner relies as a basis of this proceeding are:

(a) During the year 1929 the Commissioner determined that the petitioner was not subject to the Federal Income Tax laws and accordingly refunded sums of taxes which he determined to be illegally paid. In accordance with law, interest was refunded on these illegal payments in the amount of $3,117.50; this amount being received during the year 1929. The Commissioner has erroneously determined that this interest is subject to Federal Income Tax.

(b) Petitioner is a ward of the United States, being a member of the Creek Nation or Tribe of Indians, being enrolled opposite Creek Roll No. 1263. His property both real and personal is under the control of the United States, being under the direct supervision of the Superintendent of the Five Civilized Tribes, and under the direction and supervision of the Secretary of the Interior. The income from his allotment is received and held in trust by the said Superintendent and invested by him under the direction of the Secretary of the Interior; and the income interest upon such investments is likewise received and held by said superintendent as part of his restricted funds and property. During the year 1929, there was included in

petitioner's return, an amount of $7,797.42 representing interest upon petitioner's restricted funds; said amount being held by the said Superintendent and was not subject to the demand of the petitioner. There was also included as part of petitioner's gross income, an amount of $8,351.75, representing interest on Liberty Bonds. Accordingly petitioner erroneously paid an income tax for the year 1929 in the amount of $102.59. Wherefore, it is prayed that the Board hear this proceeding and determine:

[fol. 8] (a) That the Commissioner erroneously included as income for the year 1929 interest paid in the amount of $3,117.50.

(b) That petitioner is not subject to the Federal Income Tax Law for the year 1929.

(c) For such other and further relief as the Board may deem meet and proper in the premises.

A. G. McMillan, Acting Superintendent, Five Civilized Tribes, For Sandy Fox, Creek #1263. Thomas J. Reilly, F. M. Goodwin, Jay W. Whitney, Attorneys for Petitioner, Mills Building, Washington, D. C.

Duly sworn to by A. G. McMillan. Jurat omitted in printing.

[fol. 9] BEFORE U. S. BOARD OF TAX APPEALS

ANSWER TO AMENDED PETITION—Filed July 26, 1932

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, in answer to the amended petition of the above-named taxpayer, admits and denies as follows:

1. Admits that the notice of deficiency (a copy of which, marked Exhibit A, is attached to the original petition) is dated March 29, 1932. Denies the remaining allegations contained in paragraph 1 of the amended petition.

2. Admits that the taxes in controversy are income taxes for the calendar year 1929. Denies the remaining allegations contained in paragraph 2.

3. (a), (b). Denies the assignments of error contained in subparagraphs (a) and (b) of paragraph 3 of the amended petition.

4. (a), (b). Denies the allegations contained in subparagraphs (a) and (b), of paragraph 4 of the amended petition.

Denies generally and specifically each and every allegation contained in the amended petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that taxpayer's appeal be denied.

(Signed) C. M. Charest, General Counsel, Bureau of Internal Revenue.

Of Counsel: B. M. Coon, F. S. Gettle, Special Attorneys, Bureau of Internal Revenue.

7/23/32.

BEFORE U. S. BOARD OF TAX APPEALS

STIPULATION OF FACTS—Filed December 13, 1932

It is hereby stipulated and agreed by and between the parties hereto by their respective attorneys, that the following facts shall be taken to be true, provided however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not [fol. 10] inconsistent with the facts herein stipulated to be taken as true:

I

Petitioner is a full-blooded restricted Creek Indian being enrolled opposite Creek Roll No. NB1263.

II

His property both real and personal is restricted and under the direct supervision of the Superintendent of the Five Civilized Tribes, and under the direction and supervision of the Secretary of the Interior.

III

The income from petitioner's allotment is received and held in trust by the said Superintendent and invested by him under the direction of the Secretary of the Interior.

The income interest from such investments is likewise received and held in trust as part of petitioner's restricted funds and property.

IV

For the calendar year 1929 the Superintendent filed for petitioner an income tax return and the said Superintendent paid the tax shown thereon to be due for restricted funds of petitioner in his possession.

V

Included in petitioner's tax return for 1929 was an amount of $7,797.42 received by said Superintendent upon petitioner's restricted funds. There was also included in said return an item of $8,351.75 received by the said Superintendent as interest on Liberty Bonds held by him as part of petitioner's restricted funds. Neither of these sums were subject to petitioner's demand.

VI

During the year 1929, the Commissioner of Internal Revenue under authority of Treasury Decision 3570 refunded to said Superintendent for petitioner the following taxes which had been paid by the Superintendent as follows:

[fol. 11]

Year	Tax	Interest
1914	$ 95.43	$ 79.15
1915	858.24	637.60
1916	3,396.31	2,400.75
Total	$4,349.98	$3,117.50

There was also refunded during 1929 interest computed according to law on said refunds in the amount of $3,117.50, said interest being paid to the said Superintendent for petitioner. This interest is part of petitioner's restricted funds and is not subject to his demand.

VII

That the interest set-forth in paragraph VI has never been returned for income tax purposes by said Superintendent or petitioner.

Thomas J. Reilly, Attorney for Petitioner, C. M. Charest (BMC), Attorney for Respondent.

Before U. S. Board of Tax Appeals

Restricted Indians—Taxability of Income from Reinvested Tax Exempt Funds—Petitioner is a full-blood restricted Creek Indian. The income from his tax exempt allotted lands is received and held in trust for him by the Superintendent of the Five Civilized Tribes. During the taxable year 1929, the superintendent also received and held in trust for petitioner certain income from the reinvestment of the tax exempt income. Held, the income from the reinvested tax exempt income is subject to the Federal income tax, since there is no Federal statute, treaty or provisions of the Constitution providing for its exemption.

Thomas J. Reilly, Esq., for the petitioner.

B. M. Coon, Esq., for the respondent.

Opinion

Promulgated December 26, 1933

Black:

This proceeding is for the redetermination of a deficiency in income tax for the calendar year 1929 in the amount of $167. The amended petition alleges that the amount of taxes in controversy is $269.59, which amount includes the original assessment of $102.59, and assigns two errors, as follows:

(a) The Commissioner erred in including as income for [fol. 12] the year 1929 an amount of $3,117.50 received as interest on a refund of income tax during the year 1929.

(b) The Commissioner erred in exacting any taxes from this petitioner for the year 1929.

The facts were stipulated as follows:

Petitioner is a full-blood restricted Creek Indian, being enrolled opposite Creek Roll No. NB 1263.

His property, both real and personal, is restricted and under the direct supervision of the Superintendent of the Five Civilized Tribes, and under the direction and supervision of the Secretary of the Interior.

The income from petitioner's allotment is received and held in trust by the said Superintendent and invested by him under the direction of the Secretary of the Interior. The income interest from such investments is likewise re-

ceived and held in trust as part of petitioner's restricted funds and property.

For the calendar year 1929 the Superintendent filed for petitioner an income tax return and the said Superintendent paid the tax shown thereon to be due for restricted funds of petitioner in his possession.

Included in petitioner's tax return for 1929 was an amount of $7,797.42 received by said Superintendent upon petitioner's restricted funds. There was also included in said return an item of $8,351.75 received by the said Superintendent as interest on Liberty Bonds held by him as part of petitioner's restricted funds. Neither of these sums were subject to petitioner's demand.

During the year 1929, the Commissioner of Internal Revenue under authority of Treasury Decision 3570 refunded to said Superintendent for petitioner the following taxes which had been paid by the Superintendent as follows:

Year	Tax	Interest
1914	$ 95.43	$ 79.13
1915	858.24	637.60
1916	3,396.31	2,400.75
Total	$4,349.98	$3,117.50

[fol. 13] There was also refunded during 1929 interest computed according to law on said refunds in the amount of $3,117.50, said interest being paid to the said Superintendent for petitioner. This interest is part of petitioner's restricted funds and is not subject to his demand.

That the interest set forth in the paragraph just above has never been returned for income tax purposes by said Superintendent or petitioner.

The net income of petitioner as determined by respondent is shown in the statement attached to the deficiency notice as follows:

The records of this office disclosed that you received $3,117.50 in the form of interest on a refund of income tax during the year 1929. Interest paid on such refund is taxable income for the year in which received. Inasmuch as this office is unable to identify this item in your return, the amount has been included resulting in a deficiency of $167.00.

Net income reported on return		$16,149.17
Add:		
Interest		3,117.50
Adjusted net income		$19,266.67
Less:		
Interest on Liberty Bonds	$8,351.75	
Personal exemption	3,500.00	
Credit for dependents	400.00	
		12,251.75
Balance subject to normal tax		$ 7,014.92

The relationship between the Government and the "restricted" Indian is that of guardian and ward. Tiger v. Western Investment Co., 221 U. S. 286, 310-317; United States v. Waller, 243 U. S. 452, 459. In the instant proceeding Sandy Fox is the ward, and the pleadings were properly filed for him by the Superintendent of the Five Civilized Tribes, who is the officer of the Interior Department directly in charge of the restricted Indians of such tribes. See sec. 143 Revenue Act of 1928; Rule 6 of the Board's Rules of Practice; and sec. 17, ch. 222, Act of August 1, 1914, 38 Stat 582, 598.

[fol. 14] It is contended on behalf of petitioner that he is totally exempt from the Federal income tax on all the income involved in this proceeding because of his status as a full-blood restricted Creek Indian. The case of Mary Blackbird v. Commissioner, 38 Fed. (2d) 976, is especially cited in support of that contention. Mary Blackbird was a full-blood restricted Osage without a certificate of competency. Her principal source of income was from bonuses and royalties on tribal mineral leases. She also received a small amount as surface rental, a few dollars from miscellaneous sources, and $100 each year as interest on funds held in trust for her by the United States. In holding her not subject to the income tax statute the Tenth Circuit said, in part:

She is a restricted full-blood Osage. Her property is under the supervising control of the United States. She is its ward, and we cannot agree that because the income statute, Act of 1918 (40 Stat. 1057), and Act of 1921 (42 Stat. 227), subjects "the net income of every individual" to

the tax, this is also sufficient to make the Acts applicable to her. Such holding would be contrary to the almost unbroken policy of Congress in dealing with its Indian wards and their affairs. Whenever they and their interests have been the subject affected by legislation they have been named and their interests specially delat with. Elk v. Wilkins, 112 U. S. 94, 100, 5 S. Ct. 41, 44, 28 L. Ed. 643: "General acts of Congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them." In Choate v. Trapp, 224 U. S. 665, 32 S. Ct. 565, 56 L. Ed. 941, the court, after noting the general rule that exemptions from taxation are to be strictly construed, said at page 675 of 224 U. S., 32 S. Ct. 565, 569:

"But in the government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years and has been applied in tax cases."

The Solicitor General of the United States did not ask for a writ of certiorari in the Blackbird case.

[fol. 15] On the same day that the Tenth Circuit decided the Blackbird case, it also decided Choteau v. Commissioner, 38 Fed. (2d) 976, and held that where an Osage Indian had received his "certificate of competency" he was subject to the income tax.

The Supreme Court granted a writ of certiorari in the Choteau case and later affirmed the Board and the decision of the Circuit Court of Appeals. Choteau v. Burnet, 283 U. S. 691. While it is true that in the Choteau case the taxpayer was an Indian who had received his "certificate of competency" and in that respect was different from the instant case, where the petitioner is a restricted Indian with all the income in question having a restricted status, nevertheless, we think that the Supreme Court made it plain in the Choteau case that the exemption applying to the income of certain classes of Indians was not as broad as stated by the learned court of the Tenth Circuit in Mary Blackbird v. Commissioner, supra. In the Choteau case, the Supreme Court, among other things, said:

It is further insisted that, since the royalties are not taxable so long as they remain in the hands of the government in trust for the tribe and undistributed to members, income derived by the individual member from this fund comes from an exempt source and must therefore also be held to be exempt. • • • Royalties received by the government from mineral leases of Indian lands have been held to be beyond a state's taxing power • • • on the ground that while in the possession of the United States they are a federal instrumentality, to be used to carry out a governmental purpose. It does not follow, however, that they cannot be subjected to a federal tax. The intent to exclude must be definitely expressed, where, as here, the general langauge of the act laying the tax is broad enough to include the subject matter. • • • But whatever may have been the liability of the fund to federal taxation while it remained in the hands of the government, it cannot properly be said that the share of it paid as royaltjes to the petitioner constituted in his hands an instrumentality of the government and was therefore beyond the scope of the tax. • • • There is therefore nothing in the nature of the income which excepts it from the effect of section 213 (a) of the Revenue Act of 1918.

[fol. 16] The real test, therefore, it seems to us, of the applicability of the Federal Income Tax laws to the income of Indians is whether such income or the property which produces such income is specifically exempted from taxation, either in the tax statutes or other legislation dealing particularly with Indian affairs. This was the test applied by the Tenth Circuit in the two recent cases of Bagby v. United States, 60 Fed. (2d) 80, and Lucinda Pitman v. Commissioner, 64 Fed. (2d) 740.

The court in the Pitman case, after considering the applicable provisions of the Act of May 27, 1908 (35 Stat. 312), concluded as follows:

We conclude, therefore, that the homestead remained restricted and exempt from taxation, and that the surplus allotment became freed of restrictions and subject to taxation from and after sixty days from May 27, 1908.

In the instant proceeding the respondent is not proposing to tax any income from petitioner's allotment. Respondent in his brief admits that the income of a restricted Indian from restricted lands is exempt from taxation, but contends

that there is no provision of law or treaty which exempts income from *income from* Federal taxation, for example, interest from a refund of Federal income tax such as exists in the instant case. In making this contention respondent is following G.C.M. 9621 (X-2 C.B. 111) in which it was held that income of a restricted Indian of the Five Civilized Tribes, including the Choctaw Tribe, from the reinvestment by the Interior Department of tax exempt income from his restricted allotted lands is taxable to the same extent as the investment income of other citizens and residents of the United States. The income which the respondent has determined in his deficiency notice to be taxable is the income received from the reinvestment of the exempt income. This identical question was before us in R. E. Snell, Jr., 10 B.T.A. 1081, wherein we said in part:

> The source of the income which we are considering here is not the petitioner's homestead allotment, but is United States notes purchased and deposits made with the income from the allotment. When that income was received for the petitioners by the Superintendent of the Five Civilized Tribes, it was separated from its nontaxable source and when invested became itself a new source of income, which [fol. 17] is not protected from taxation either by the Revenue Act of 1918 or by prior acts of Congress under which the homestead allotment was made. We are therefore of the opinion that the interest on the Government notes and bank deposits involved herein is subjected to tax under the Revenue Act of 1918.

Our decision in the Snell case was made prior to the decisions in the Blackbird, Choteau, Bagby, and Pitman cases, supra. With the exception of the Blackbird case, we see nothing in these cases which would require a reversal of our holding in the Snell case; and we regard the holding in the Blackbird case as having been somewhat modified by the later decisions in the Choteau, Bagby, and Pitman cases. Furthermore, we believe the holdings in McCurdy v. United States, 246 U. S. 263; United States v. Ransom, 263 U. S. 691; and Shaw v. Gibson-Zahniser Oil Corp., 276 U. S. 575, all tend to support the decision made in the Snell case. These cases all stand for the proposition that where lands which are subject to taxation and owned by non-Indian citizens are purchased for a restricted Indian, under the supervision of the Secretary of the Interior, with moneys derived

as royalties from departmental leases of the Indian's restricted allotment, the act of the Secretary in restricting such purchased lands as to alienation can not have the effect of exempting such lands from state taxation, in the absence of an express provision by Congress to that effect. In Shaw v. Gibson-Zahniser Oil Corp., supra, the Supreme Court, after observing that the plan of the Government has been gradually to emancipate the Indian from his former status as a ward, said:

> • • • In this as in other Indian legislation, opportunity is afforded for their emancipation by imposing upon them duties as well as giving them the privileges of citizens and property owners, including the duty to pay taxes.
>
> In a broad sense all lands which the Indians are permitted to purchase out of taxable lands of the state in this process of their emancipation and assumption of the responsibility of citizenship, whether restricted or not, may be said to be instrumentalities in that process. But they are far less intimately connected with the performance of an essential governmental function than were the restricted allotted lands, and the accomplishment of their purpose obviously does not require entire independence of state control in matters of taxation. To hold them immune would be [fol. 18] inconsistent with one of the very purposes of their creation, to educate the Indians in responsibility, and would present the curious paradox that the Secretary by a mere conveyancer's restriction, permitted by Congress, had rendered the land free from taxation and thus actually relieved the Indians of all responsibility. There are some instrumentalities which, though Congress may protect them from state taxation, will nevertheless be subject to that taxation unless Congress speaks. [Citations.] These lands we take to be of that character.
>
> The principle thus announced as to lands and their taxability would appear to be just as applicable to new acquisitions of personal property and the income therefrom. See also United States v. Gray (C. C. A., 8th Cir.), 284 Fed. 103.

Returning now to the Blackbird decision, counsel for petitioner, in his brief, observes: "One of the items under consideration in the Blackbird case was interest on funds held in trust by the United States, the identical issue presented in this Appeal." This is, of course, literally true as

to the $100 item, but the point of law involved in the Snell case was not discussed by the court in the Blackbird case, and, as we have previously indicated, it is our opinion that the Blackbird decision was somewhat modified by the later decisions in the Choteau, Bagby, and Pitman cases.

Counsel for petitioner emphasizes the fact that the income in question is held in trust by the superintendent and was not subject to petitioner's demand. This is of course true in all cases where there is a guardianship relationship. But the income itself is not exempt from taxation unless it is somewhere so provided. The respondent does not propose to subject the Liberty bond interest of $8,351.75 to the normal tax. Aside from this item of income being exempt from the normal tax, the items of income here involved are not exempt by virtue of any provision in any treaty with the Indians, the Sixteenth Amendment to the Constitution, the Revenue Act of 1928, or any other statute of the United States. The determination of the respondent is approved.

Reviewed by the Board.

Decision will be entered for the respondent.

[fol. 19] Before U. S. Board of Tax Appeals

DECISION

Pursuant to the determination of the Board, as set forth in its report promulgated, it is

Ordered and Decided: That there is a deficiency in income tax of $167.00 and no overpayment due the petitioner for the year 1929.

(Signed) Eugene Black, Member.

Entered Dec. 29, 1933.

PETITION FOR THE REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS

Filed January 27, 1934

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Tenth Circuit:

Superintendent, Five Civilized Tribes for Sandy Fox, in support of this, his petition filed in pursuance of the provisions of Section 1001 of the Revenue Act of 1926 as

amended by Section 1101 (a) of the Revenue Act of 1932, for the review of the decision of the United States Board of Tax Appeals rendered on the 29th day of December, 1933, approving deficiencies in income taxes for 1929 in the amount of $167, respectfully shows to this Honorable Court as folows:

I. Statement of the Nature of the Controversy

Under the provisions of the Revenue Act of 1928, petitioner duly filed with the United States Board of Tax Appeals a petition and an amended petition requesting a redetermination of a deficiency asserted by the Commissioner of Internal Revenue and asserting that petitioner was not subject to the Federal Income Tax Law. The respondent filed an answer to petitioner's amended petition and the cause being at issue was submitted on an agreed stipulation of facts at a hearing before the United States Board of Tax Appeals on December 13, 1932.

It was stipulated that petitioner is a full-blood restricted Creek Indian and that his property, both real and personal, is restricted and under the direct supervision of the Superintendent of the Five Civilized Tribes, and under the [fol. 20] direction and supervision of the Secretary of the Interior.

The income from petitioner's allotment is received and held in trust by the said Superintendent and invested by him under the direction of the Secretary of the Interior. The income interest from such investments is likewise received and held in trust as part of petitioner's restricted funds and property. For the calendar year 1929 the Superintendent filed for petitioner an income tax return and the said Superintendent paid the tax shown thereon to be due for restricted funds of petitioner in his possession.

Included in petitioner's tax return for 1929 was an amount of $7,797.42 received by said Superintendent upon petitioner's restricted funds. There was also included in said return an item of $8,351.75 received by the said Superintendent as interest on Liberty Bonds held by him as part of petitioner's restricted funds. Neither of these sums were subject to petitioner's demand.

During the year 1929, the Commissioner of Internal Revenue under authority of Treasury Decision 3570 refunded to said Superintendent for petitioner the following taxes which had been paid by the Superintendent as follows:

Year	Tax	Interest
1914	$ 95.43	$ 79.15
1915	858.24	637.60
1916	3,396.31	2,400.75
Total	$4,349.98	$3,117.50

There was also refunded during 1929 interest computed according to law on said refunds in the amount of $3,117.-50, said interest being paid to the said Superintendent for petitioner. This interest is part of petitioner's restricted funds and is not subject to his demand.

That the interest set forth in the paragraph just above has never been returned for income tax purposes by said Superintendent or petitioner.

From the above statement of facts, the United States Board of Tax Appeals held as a matter of law that the restricted income from restricted property of a restricted member of the Five Civilized Tribes is taxable to said [fol. 21] member, although the income is received by the Superintendent for the Indian, becomes a part of the Indian's restricted funds, and is not subject to the Indian's demand.

II. Designation of Court of Review

The petitioner being aggrieved by the said findings of fact, opinion, decision and order, and being an individual desires a review thereof in accordance with the provisions of the Revenue Act of 1926 as modified by the Revenue Act of 1932 by the United States Circuit Court of Appeals for the Tenth Circuit whereof he is an inhabitant.

III. Assignments of Error

The petitioner, as a basis for review, makes the following assignments of error:

1. The Board erred in holding that under the stipulated facts in this case that petitioner is subject to the federal income tax laws when it was shown that petitioner is a full blood restricted Creek Indian; that the income in question is restricted income from restricted property, is received by the Superintendent of the Five Civilized Tribes for petitioner, is held in trust by the said Superintendent and invested by him under the direction of the Secretary of

the Interior, is a part of petitioner's restricted funds and is not subject to his demand.

2. The Board erred in not following the law as set forth in the decision of this honorable court in the case of Mary Blackbird v. Commissioner, 38 Fed. (2d) 976.

3. The Board erred in entering judgment for the respondent.

Wherefore your petitioner prays that this honorable court may review said findings, opinion, decision and order and reverse and set aside the same and that this court grant such other and further relief as the court may deem meet and proper in the premises.

Superintendent, Five Civilized Tribes for Sandy Fox.

F. M. Goodwin, Jay W. Whitney, Thomas J. Reilly, Attorneys for Petitioner.

[fol. 22] *Duly sworn to by Thomas J. Reilly. Jurat omitted in printing.*

Before U. S. Board of Tax Appeals

NOTICE OF PETITION FOR REVIEW

Filed January 27, 1934

To E. Barrett Prettyman, General Counsel, Bureau of Internal Revenue, Attorney for Respondent.

You are hereby notified that a petition for review in the above-entitled cause was filed with the United States Board of Tax Appeals on the 27th day of January, 1934.

A copy of said petition is served upon you herewith.

Thomas J. Reilly, Attorney for Petitioner.

Service accepted this 27th day of January, 1934.

E. Barrett Prettyman, General Counsel, Bureau of Internal Revenue, Attorney for Respondent.

Before U. S. Board of Tax Appeals

DESIGNATION OF RECORD

Filed January 27, 1934

To the Clerk of the United States Board of Tax Appeals:

You will please prepare and, on or before the 28th day of March, 1934, transmit to the clerk of the Circuit Court

of Appeals for the Tenth Circuit, certified copies of the following documents:

[fols. 23 & 24] 1. The docket entries of proceedings before the United States Board of Tax Appeals in the case above entitled.

2. Petition.

3. Stipulation of Facts.

4. Amended petition.

5. Answer to amended petition.

6. Findings of fact, opinion and decision of Board.

7. Petition for review to the Circuit Court of Appeals for the Tenth Circuit and acknowledgment thereof.

8. This designation of record and acknowledgment thereof.

9. The foregoing to be prepared, certified and transmitted as required by law and the rules of the Circuit Court of Appeals for the Tenth Circuit.

Thomas J. Reilly, Attorney for Superintendent, Five Civilized Tribes for Sandy Fox.

January 27, 1934.

Service of a true copy of the above præcipe for the record is hereby acknowledged this 27th day of January, 1934.

E. Barrett Prettyman, General Counsel, Bureau of Internal Revenue.

Clerk's Certificate to foreging transcript omitted in printing.

[fol. 25] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

ORDER OF SUBMISSION.—Sept. 10, 1934

Before Honorable Robert E. Lewis, Honorable George T. McDermott and Honorable Sam G. Bratton, Circuit Judges.

This cause came on to be heard, no one appearing for petitioner, Frank J. Wideman, Esquire, appearing for respondent.

Thereupon this cause was argued by counsel for respondent and was submitted to the court.

IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 1038

September Term, 1934

Thomas J. Reilly, F. M. Goodwin, Jay W. Whitney, and Leahy, MacDonald & Files, filed a brief for petitioner.

Frank J. Wideman, Asst. Attorney General (Sewall Key and J. P. Jackson, Spec. Assts. to Attorney General, were with him on the brief) for respondent.

Before Lewis, McDermott, and Bratton, Circuit Judges.

McDermott, Circuit Judge, delivered the opinion of the court.

OPINION.—January 9, 1935

This petition to review a decision of the Board of Tax Appeals presents this close and difficult question: Where the guardian of a restricted Indian has invested moneys saved from the income from his ward's allotment, is the income from such investments taxable under the federal income tax law? It has been authoritatively decided that income received from his allotment, and income received by him from tribal property held in trust is not subject to income tax. Blackbird v. Commissioner (C. C. A. 10) 38 F. (2d) 976. It has been authoritatively decided that lands purchased for investment from such savings, although restricted, are subject to taxation by the state. Shaw v. Oil Corporation, 276 U. S. 575; United States v. Ransom [fol. 26] (C. C. A. 8) 284 F. 108, affirmed 263 U. S. 691; United States v. Gray (C. C. A. 8) 284 F. 103; United States v. Mummert (C. C. A. 8) 15 F. (2d) 926. But whether the income from restricted property so acquired is subject to the federal tax has not been before the courts.

Sandy Fox is a full-blood restricted Creek Indian, whose property both real and personal is under the direct supervision and control of the Superintendent of the Five Civ-

ilized Tribes and the Secretary of the Interior. The income from his allotment being in excess of his needs, the surplus was invested for him by the Superintendent, and the income from such investments was held by the Superintendent in trust as part of the restricted property. In 1929 the Superintendent returned for taxation income derived from such invested savings in the sum of $16,149.17 and a tax of $102.50 thereon was assessed and paid. The Commissioner added to his return $3,117.50 interest on a tax refund received in the taxable year from the government and assessed a deficiency of $167.00. In a review before the Board of Tax Appeals, the taxpayer resisted this deficiency assessment and sought to recover the $102.50 paid. The Commissioner's ruling was in accord with a memorandum of its General Counsel, G. C. M. 9621; the Board of Tax Appeals affirmed the Commissioner in accord with an earlier decision directly in point. Snell v. Commissioner, 10 B. T. A. 1081.[1]

The interest received from the government on amounts erroneously paid in preceding years, is income received by the taxpayer during the taxable year, as were the amounts returned and on which the tax of $102.50 was paid. If this income is exempt from taxation, it must be either because of the status of the taxpayer or because of the nature of the income.

In Blackbird v. Commissioner (C. C. A. 10) 38 F. (2d) 976, this court held that the income[2] of a restricted Osage

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[1]The interest received from the government is not exempt under the section exempting interest upon government bonds. Helvering v. Stockholms Enskilda Bank, —— U. S. —— (decided November 6, 1934).

[2]Mary Blackbird's income was more than $24,000, of which all but $30.96 was from her allotments or from minerals and funds held by the United States in trust for the members of the Osage Tribe. The $30.96 may have been income from invested savings, but this item was not considered, either in the briefs or our opinion, as differing from the other income. The question now before us may have lurked in the record in that case, to the extent of

Indian was not within the purview of the Income Tax [fol. 27] Statutes, and Judge Lewis cited many authorities to the point that general acts of Congress do not apply to Indian wards of the government unless an intention to include them was clearly manifested. This court at the same time held that this general rule did not apply to an Osage Indian who had been granted a certificate of competency enabling him to alienate any of his property except his homeste-d. Choteau v. Commissioner (C. C. A. 10) 38 F. (d) 976.

The Blackbird and Choteau Cases were decided by one opinion. The government acquiesced in the ruling in the Blackbird Case, but certiorari was granted in the Choteau Case. In its opinion in the Choteau Case, 283 U. S. 691, the Supreme Court expressly disclaimed an intent to pass upon the taxability of the income of an incompetent Indian. It affirmed the decision of this court on the ground that Choteau had the power to alienate his surplus allotment, and that it was taxable by the state. That decision does not reach our case, for Sandy Fox could not alienate. Some of the language of that opinion may be pertinent for, without mentioning its expressions in earlier opinions, the court said:

"The language of §§ 210 and 211 (a) (40 Stat. 1062) subjects the income of 'every individual' to tax. Section 213 (a) (40 Stat. 1065) includes incomes 'from any source whatever.' The intent of Congress was to levy the tax with respect to all residents of the United States and upon all sorts of income. The act does not expressly exempt the sort of income here involved, nor a person having petitioner's status respecting such income, and we are not referred to any other statute which does. • • • The intent to exclude must be definitely expressed, where, as here, the general language of the Act laying the tax is broad enough to include the subject matter."

$30.96, but receiving no consideration, the case is not controlling on the point now under consideration. "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." Webster v. Fall, 266 U. S. 507, 511. And, also, Satterlee v. Harris (C. C. A. 10) 60 F. (2d) 490.

Concerning the government's general policy toward the Indian, the court said:

"The course of legislation discloses that the plan of the government has been gradually to emancipate the Indian from his former status as a ward; to prepare him for com- [fol. 28] plete independence by education and the gradual release of his property to his own individual management. This plan has included imposing upon him both the responsibilities and the privileges of the owner of property, including the duty to pay taxes."

Following the decision in the Choteau Case, this court was confronted with Pitman v. Commissioner, 64 F. (2d) 740. The taxpayer there was a full-blood Creek. The power of Creeks to alienate their allotments depends upon the quantum of blood. Act of May 27, 1908. By Section 4 of that Act, unrestricted lands were subject to taxation. Section 9 of that Act provided that the death of an allottee removed all restrictions then existing, except that full-blood Indian heirs could not convey without the consent of the probate court. Mrs. Pitman inherited from her son some lands unrestricted in his lifetime, and a restricted homestead. This court held that, notwithstanding the taxpayer was a full-blood Creek, and as such not manifestly included in the federal taxing statute, her income from unrestricted land was subject to tax while her income from the restricted land was not.

These decisions support the conclusion that a full-blood Indian is an individual embraced within the term "every individual" as used in the federal taxing statute; that such exemption from taxation as he enjoys arises, not from his blood or race, but from the nature of the property giving rise to the income. But in the cases so far considered, the property from which the taxable income was derived was unrestricted and subject to state taxation. In our case, the property giving rise to the income is restricted, as is the income itself.

We come then to the question of whether the fact that land is restricted exempts it from taxation. That question has not been answered as far as federal taxes are concerned, but it has been conclusively answered as to state taxes. Commencing with the opinion of Judge Lewis in United States v. Gray, 284 F. 103, the Eighth Circuit Court

of Appeals has consistently held that where lands, previously unrestricted and subject to taxation, were purchased with proceeds of the sale of restricted land, held in trust by the United States, and where the lands purchased were restricted in the hands of the Indian, such lands were subject to state taxation. United States v. Ransom (C. C. A. 8) 284 F. 108; United States v. Mummert (C. C. A. 8) 15 F. (2d) 926.

[fol. 29] In Shaw v. Oil Corporation, 276 U. S. 575, the guardians of a minor full-blood Creek purchased lands with moneys of their ward which had accumulated from the income of the ward's original restricted allotment. The purchased lands were alienable only with the approval of the Secretary of the Interior. An oil and gas lease was executed. The state undertook to impose its gross production tax on the oil produced. The Supreme Court held the Secretary had the power to reimpose restrictions on lands once unrestricted, but held

"The construction to be placed on these decisions is that the lands now in question, and hence the interest of the lessee in them, are not such instrumentalities of the government as will be declared immune from taxation in the absence of an express exemption by Congress and that the mere act of the Secretary in imposing the restriction is not the exercise of any power which may reside in Congress to exempt them from taxation. • • • In any case the Secretary of the Interior has never, by rule or regulation or other action, purported to exempt such lands from state taxation. No such action is to be implied from his authorized action in restricting the power of the Indian grantee to alienate the land."

Nothwithstanding that the court was dealing with a restricted, full-blood, minor Indian, the court held that the duty of paying taxes was one step in the emancipation of the Indian, saying:

"In a broad sense all lands which the Indians are permitted to purchase out of the taxable lands of the state in this process of their emancipation and assumption of the responsibility of citizenship, whether restricted or not, may be said to be instrumentalities in that process. But they are far less intimately connected with a performance of an essential governmental function than were the restricted

allotted lands, and the accomplishment of their purpose obviously does not require entire independence of state control in matters of taxation. To hold them immune would be inconsistent with one of the very purposes of their creation, to educate the Indians in responsibility, and would present the curious paradox that the Secretary by a mere conveyancer's restriction, permitted by Congress, had rendered the land free from taxation and thus actually relieved the Indians of all responsibility. There are some [fol. 30] instrumentalities which, though Congress may protect them from state taxation, will nevertheless be subject to that taxation unless Congress speaks."

While these cases involve state taxes, Congress had the power to exempt its Indian wards from paying them. But the Supreme Court held that exemption from taxation could not be deduced from the restricted status of the land. It further held that land purchased from accumulated savings was not as distinctly an instrumentality of government as the original allotment.

We can see no tenable distinction between land and personal property. If the surplus of an Indian invested in land is subject to state taxation, that surplus should be taxable if invested in a mortgage on the land, or in shares of stock. If Congress intended that such investments should be subject to state taxation, we can see no reason for holding that if intended to exempt the income from such investments from federal taxation. Every reason assigned for one applies to the other.

The whole question is one of statutory construction. Congress has the power to tax the income of an Indian from any source, just as it has the power to exempt all his property from state taxes. What did Congress intend? The Supreme Court has held it did not intend to exempt Indians as such from federal taxes; that it did not intend to exempt restricted property as such from state taxes; that property acquired for investment is not a federal instrumentality in the sense the original allotment is. While the question is not free from doubt, we are of the opinion that, as construed by the Supreme Court, the intent of Congress was to subject the income from investments of surplus funds, as well as the investments themselves, to taxation.

This view is supported by the administrative and legislative history. The Board of Tax Appeals in 1928 held that

the income received by the Superintendent of the Five Civilized Tribes from securities purchased for a Creek Indian with royalties from restricted land were subject to the income tax. Snell v. Commissioner, 10 B. T. A. 1081. In 1929, in the Blackbird Case, the Board extended this doctrine to include income from an original allotment and from minerals held in trust for the Tribe. This court reversed the Blackbird Case. After the Supreme Court af- [fol. 31] firmed the Choteau Case, the Commission promulgated a ruling, G. C. M. 9621, under which registered Indians are exempted from tax upon such incomes as were dealt with in the Blackbird Case, but taxed upon incomes from investments of income. Since then Congress has twice reenacted the income tax law, but has not disturbed this departmental ruling. On the contrary, in a Joint Resolution passed February 14, 1933, S. J. Res. 167, extending the time to members of Indian Tribes for filing claims for interest on refunds, Congress limited its application to (a) Indians who received allotments of land which were partially or wholly exempt from tax, and from which land the restrictions have or have not been removed, and (b) to taxes paid on "rents, royalties, or other gains arising from such allotted lands." Congress is therefore familiar with the distinction between income from the original heritage of the Indian and other income. There is, moreover, a reason for the distinction. The income from the allotments of many or most of the Indians is barely sufficient to support them; but oil was discovered upon the allotments of some, and those received an income much larger than their needs; when that surplus was invested and in turn produced income, there is reason in requiring such wealthy Indians to contribute to the cost of government whose services they enjoy. In the face of this history, we conclude that Congress is content with the administrative interpretation of its acts.

The order of the Board is Affirmed.

LEWIS, Circuit Judge:

I suggest a question of jurisdiction, and am inclined to the belief that power in this court to review the Board's order does not exist. We have this anomalous procedure: The Superintendent of the Five Civilized Tribes filed a petition for review. He is an officer in the Interior De-

partment. Counsel who represent him were employed by the Interior Department. Respondent, Commissioner of Internal Revenue, is also an officer in an executive department of the government, and he is represented by counsel in that department. Petitioner contends that Sandy Fox, an Indian whom he professes to represent, and his property are not subject to an income tax, and respondent contends to the contrary. Is this a case or controversy over which this court has jurisdiction? In Old Colony Tr. Co. v. Comm'r. Int. Rev., 279 U. S. 715, the court in construing [fol. 32] the act conferring jurisdiction on Circuit Courts of Appeal to review the orders of the Board of Tax Appeals quoted with approval this from the opinion of Mr. Justice Field in 32 Fed. 241, 255:

"The judicial article of the Constitution mentions cases and controversies. • • • The term (case) implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication."

The Chief Justice then said:

"The Circuit Court of Appeals is a constitutional court under the definition of such courts as given in the Bakelite case, supra, and a case or controversy may come before it, provided it involves neither advisory nor executive action by it.

"In the case we have here, there are adverse parties. The United States or its authorized official asserts its right to the payment by a taxpayer of a tax due from him to the Government, and the taxpayer is resisting that payment or is seeking to recover what he has already paid as taxes when by law they were not properly due. That makes a case or controversy, and the proper disposition of it is the exercise of judicial power."

So the question arises whether the parties are adversaries in a case or controversy within our jurisdiction, or whether being officers of the United States Government they are only seeking advisory instructions.

But on the merits I disagree with the conclusion reached by my associates. The Act of May 27, 1908 (35 Stat. 312) applies to the Five Civilized Tribes. We held in Bagby v. United States, 60 F. (2) 80, and in Pitman v. Comm'r Int. Rev., 64 F. (2) 740, that under the facts in each of those

cases said act removed the restrictions from the allotments there under consideration, that such removal rendered each of said allotments subject to taxation, and that the rentals or royalties from said allotments were income subject to federal income tax. We further held in Chouteau v. Comm'r Int. Rev., 38 F. (2) 976, that a certificate of competency issued to and held by Chouteau under section 2 of the Act of June 28, 1906 (34 Stat. 539) removed the restrictions from his allotment and perforce thereof from his income therefrom and rendered said income subject to federal taxa-
[fol. 33] tion; that said certificate exempted Chouteau and his property from federal supervision, excepting his homestead; that it gave him full power to use and dispose of his property according to his own judgment and thus there was imposed on him and he assumed the same burden as other individual property owners. The Supreme Court affirmed our judgment in the Chouteau case. Chouteau v. Comm'r, 283 U. S. 691. It may also be conceded that Congress may confer on the Secretary of the Interior, or other officials, power to remove from the lands of an Indian exemption from taxation, and when so removed from such lands or other property it becomes subject to taxation by state and nation. Action removing the exemption by either method expresses a clear intention by Congress to render the Indian's property subject to taxation. There could be no other intention.

Sandy Fox, the taxpayer, is a full-blood Creek Indian enrolled as a member of that tribe under a given number. It was stipulated that he and his property, both real and personal, are restricted, and that his property is under the direct supervision of the Superintendent of the Five Civilized Tribes subject to the direction of the Secretary of the Interior; that income from his allotment is so received and held; that interest on such income when invested is likewise received and held in trust as a part of his restricted funds and property. There has been no removal of restrictions as to him or his property. Nevertheless the Board held said income to be taxable. I think the Board erred. We held to the contrary in Mary Blackbird v. Comm'r Int. Rev., 38 F. (2) 976. I can add nothing to what we said in her case. She was a full blood member of the Osage tribe. Her property from which income was received was restricted, and she did not have a certificate of competency. Like Fox, she was a ward of the government of the United States, and, like

him, she had no other guardian. We held she was not subject to the tax. I can see no material difference between her and her property on the one hand and Fox and his property on the other as to the point here involved. Not only does the majority opinion overrule the Mary Blackbird case, it also disregards the wholesome doctrine of *stare decisis*.

It is the duty of a trustee to invest funds in his hands. 1 Perry on Trusts, 5th Ed., Sec. 452. Interest received by him should be added to the trust estate. United States v. Brown, 8 F. (2) 567.

[fol. 34] It is true that the rights and duties of citizenship were conferred on Fox by section 6 of the Act of February 8, 1887 (24 Stat. 388), as amended by the Act of March 3, 1901 (31 Stat. 1447); but it was appropriately said by the Eighth Circuit in United States v. Gray, 201 Fed. 291, 293:

"The civil and political status of the Indians does not condition the power of the government to protect their property or to instruct them. Their admission to citizenship does not deprive the United States of its power, nor relieve it of its duty, to control their property, to protect their rights to it from the rapacity and faithlessness of the members of the superior race, to discharge faithfully its legal and moral obligations to them, and to execute every trust with which it is charged for their benefit."

See also National Bank v. Anderson, 147 Fed. 87, 90.

IN UNITED STATES CIRCUIT COURT OF APPEALS

Before Honorable Robert E. Lewis and Honorable Orie L. Phillips, Circuit Judges

JUDGMENT—Jan. 9, 1935

This cause came on to be heard on the transcript of the record from the United States Board of Tax Appeals and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the decision of the said United States Board of Tax Appeals in this cause be and the same is hereby affirmed; and that Commissioner of Internal

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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1934

No. 817

SUPERINTENDENT FIVE CIVILIZED TRIBES, FOR SANDY FOX, CREEK No. 1263, *Petitioner*,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

THOMAS J. REILLY,
F. M. GOODWIN,
MULLEN & SHEA,
Washington, D. C.
Attorneys for Petitioner.

HARMONY PRESS, INC., WASHINGTON, D. C.

INDEX

	Page
Question Presented	2
Statutes and Regulations Involved	2
Statement	3
Specifications of Errors to be Urged	5
Reasons for Granting This Writ of Certiorari	5
Conclusion	12
Appendix	
Revenue Act and Regulations Involved	13
Legislation Pertaining to Taxation of Allottees of the Five Civilized Tribes	16
Dissenting Opinion of Judge Lewis on the Merits	18
Unreported Decision in *Marble v. King*, et al., No. 900 Equity, Decided August 1934 by the District Court for the Northern District of Oklahoma	22

TABLE OF CASES CITED

	Page
Bagby v. United States, 60 F. (2d) 80	6
Blackbird v. Commissioner, 38 F. (2d) 976, reversing 14 B. T. A. 1247	4, 5, 7
Choate v. Trapp, 224 U. S. 665	6
Choteau v. Burnet, 38 F. (2d) 976, affirmed, 283 U. S. 691	4, 6
Elk v. Wilkins, 112 U. S. 94	5
Marble v. King, et al., unreported	10, 22
Pitman v. Commissioner, 64 F. (2d) 740	6
Shaw v. Oil Corporation, 276 U. S. 575	9, 10
Snell v. Commissioner, 10 B. T. A. 1081	4
Tiger v. Western Investment Co., 221 U. S. 286	11
United States v. Gray, 284 F. 103	9
United States v. Mummert, 15 F. (2d) 926	9
United States v. Ransom, 284 F. 108	9

STATUTES CITED

Act of June 28, 1906, 34 Stat. 539	7
Act of May 27, 1908, Sec. 4, 35 Stat. 312	6
Act of August 1, 1914, Sec. 17, 38 Stat. 582	11
Revenue Act of 1928, Sec. 143 (a), 45 Stat. 791	11

OTHER AUTHORITIES CITED

34 Ops. A. G. 275	7, 8
34 Ops. A. G. 302	8
34 Ops. A. G. 439	8
35 Ops. A. G. 1	9
I. T. 1366, C. B. I-I, Jan.-June, 1922	11
Rules of Practice, B. T. A.	11
T. D. 3570, C. B. III-I, Jan.-June, 1924	3, 7

IN THE

Supreme Court of the United States

OCTOBER TERM 1934

No._____

SUPERINTENDENT FIVE CIVILIZED TRIBES, FOR SANDY FOX, CREEK No. 1263, *Petitioner*,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

Your petitioner, Superintendent Five Civilized Tribes, for Sandy Fox, Creek No. 1263, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Tenth Circuit in the above entitled case, which was Numbered 1038 on the docket of the Circuit Court of Appeals. The judgment of that court in accordance with the majority opinion was entered January 9, 1935. This judgment (Judge Lewis delivering a dissenting opinion on the merits) denied a petition for review, and affirmed the order of the United States Board

of Tax Appeals. The opinions of the court below (R. 25) are reported in 74 Fed. (2d) —. The opinion of the Board of Tax Appeals (R. 11) is reported in 29 B. T. A. 635. The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

By Federal Statute the real and personal property of all full-blood, allotted, restricted Indians is under the immediate supervision and control of the respective Superintendents of the several Indian Agencies. The income from such property is received and held in trust by such Superintendents and invested by them under the direction of the Secretary of the Interior.

The interest which accrues from such investments is likewise received and held in trust by the respective Superintendents.

The question is whether such "reinvested income" (income from investments) which is thus held in trust by the Superintendents, is taxable under the Federal Income Tax laws.

Although this question comes up on behalf of a single restricted Indian of the Five Civilized Tribes, it is of importance to all restricted Indians of all tribes, since it will determine the tax status of their refunds or assessments for prior years and for years to come.

STATUTES AND REGULATIONS INVOLVED

The pertinent parts of the Revenue Act involved will be found in Appendix A, *infra*, p. 13. The pertinent statutes relating to taxation of members of the Five Civilized Tribes will be found in Appendix B, *infra*, p. 16.

STATEMENT

Sandy Fox is an allotted, fullblood, restricted, Creek Indian, whose property both real and personal is under the direct supervision and control of the Superintendent of the Five Civilized Tribes and the Secretary of the Interior. The income from his allotment is received and held in trust by the said Superintendent and invested by him under the direction of the Secretary of the Interior. The income interest from such investments is likewise received and held in trust as part of petitioner's restricted funds and property.

For the calendar year 1929 the Superintendent filed for Sandy Fox an income tax return and paid a tax of $102.59 from the restricted funds of petitioner in his possession. Reported in this return for 1929 was an item of income in the sum of $7,797.42 received by said Superintendent as interest from the investment of petitioner's restricted funds. The return also included an item of $8,351.75 received by the said Superintendent as interest on Liberty Bonds held by him as part of petitioner's restricted funds. Both of these items of income, in turn, became a part of petitioner's restricted funds.

During the year 1929, the Commissioner of Internal Revenue under authority of Treasury Decision 3570 (Cum. Bulletin III-1, p. 85) refunded to said Superintendent for Fox taxes, erroneously paid by the Superintendent on the income from Fox's allotment, with interest as provided by law:

Year	Tax	Interest
1914	$ 95.43	$ 79.15
1915	858.24	637.60
1916	3,396.31	2,400.75
Total	$4,349.98	$3,117.50

This interest in the sum of $3,117.50 is also a part of petitioner's restricted funds and was not included in petitioner's tax return. The Commissioner of Internal Revenue, however, increased the income reported on the return by this sum and determined a deficiency of $167.00.

In a review before the Board of Tax Appeals petitioner resisted the deficiency thus determined and sought a recovery of the $102.59 previously paid on the theory that he was not subject to the federal income tax laws in respect to the income in question under authority of *Blackbird v. Commissioner* (C. C. A. 10) 38 F. (2d) 976; reversing 14 B. T. A. 1247, in which case the Solicitor General did not seek a review by this court.

The Board of Tax Appeals denied petitioner's contention 29 B. T. A. 635 (R. 11), and approved the action taken by the Commissioner of Internal Revenue on authority of its earlier decision in *Snell v. Commissioner* 10 B. T. A. 1081, asserting that the holding in the *Blackbird Case, supra*, was somewhat modified by this Court's opinion in *Choteau v. Burnet* 283 U. S. 691.

The Court of Appeals in its majority opinion respecting (to use its language R. 25) "this close and difficult question," asserts that *Blackbird v. Commissioner, supra*, authoritatively decided "that income received from his allotment, and income received by him from tribal property held in trust is not subject to income tax." But whether the interest income from the investment of this nontaxable income which is likewise restricted, is taxable

"has not been before the courts."

The court then states that the whole question is one of statutory construction and after recognizing the power of Congress to tax the income of an Indian from any source, states: (R. 30).

"While the question is not free from doubt, we are of the opinion, that, as construed by the Supreme Court, the intent of Congress was to subject the income from investments of surplus funds, as well as the investments themselves, to taxation."

Judge Lewis in dissenting states that the majority decision in this case is "contrary" to *Blackbird v. Commissioner, supra.* He could see no material difference between Blackbird and her property on the one hand and Fox and his property on the other. Further, he stated that "not only does the majority opinion overrule the Mary Blackbird case, it also disregards the wholesome doctrine of *stare decisis.*" (R. 33.)

SPECIFICATIONS OF ERRORS TO BE URGED

1. The Court below erred in holding that Congress intended to impose an income tax on the restricted income received and held by the Superintendent of the Five Civilized Tribes when the income arises from the investment by him, subject to the direction of the Secretary of the Interior, of a restricted, full-blood Indian's restricted property.

2. The Court below erred in holding that its earlier decision in *Blackbird v. Commissioner* 38 F. (2d) 976 did not decide the question herein presented.

3. The Court below erred in affirming the order of the United States Board of Tax Appeals.

REASONS FOR GRANTING THIS WRIT OF CERTIORARI

1. The majority opinion below is contrary to this Court's decisions in earlier cases.

In *Elk v. Wilkins* 112 U. S. 94,100, it is stated:

> "General Acts of Congress do not apply to Indians, unless so expressed as to clearly manifest an intention to include them."

Federal income tax laws are general acts of Congress and the rule above set out is particularly applicable, where, as here, Congress has dealt specially respecting taxation of allotments of members of the Five Civilized Tribes. [Act of May 27, 1908, (35 Stat. 312.)] By the terms of this Act restrictions on allotments are removed under certain conditions and coincident with the removal of restrictions, the allotments become taxable under the provisions of Sec. 4 of said Act.

The general policy of the Federal Government has been, not to impose a Federal Income Tax upon the income derived from the restricted lands of a restricted Indian. Inalienability and non-taxability are natural concomitants, otherwise involuntary sales of property to satisfy tax obligations could be effected. It is the removal of restrictions (unless a right of non-taxability exists by treaty or contract) that subjects an Indian's property to taxation and this construction is specifically enacted as Section 4 of the Act of May 27, 1908, *supra*. See also *Choate v. Trapp* 224 U. S. 665, 675.

In *Bagby v. United States* (C. C. A. 10) 60 F. (2d) 80 and in *Pitman v. Commissioner* (C. C. A. 10) 64 F. (2d) 740, involving members of the Five Civilized Tribes, it was held that restrictions had been removed from the allotments in question and by reason thereof rents or royalties from these allotments were income subject to the federal income tax, by virtue of Sec. 4 of the Act of May 27, 1908.

In *Choteau v. Commissioner* (C. C. A. 10) 38 F. (2d) 976, affirmed 283 U. S. 691 (involving an Osage Indian) a certificate of competency had been issued under the Act of June

28, 1906 (34 Stat. 539) which removed the restrictions from his allotment, and this Court stated (p. 695):

> "Since 1910, when he received his certificate, petitioner has *therefore* been taxable upon his allotted lands, except his homestead." (Italics supplied.)

With respect to the income received by Choteau it was noted that it was clearly beyond the control of the United States and that his right to receive and use it was absolute. Restrictions had been removed; this Court holding (p. 696):

> "The claim that with respect to this income the petitioner was restricted, and therefore exempt from the tax laid by Sections 210 and 211 (a) [40 Stat. 1062] must fail."

In the instant case restrictions exist both as to Sandy Fox and all his property, real and personal. His property is under the direct supervision of the Superintendent of the Five Civilized Tribes, subject to the direction of the Secretary of the Interior. The income from his allotment, and the income from investments are both received and held in trust by the said Superintendent as part of petitioner's restricted funds and property.

The question of taxation relates to the income received by the Superintendent from the investment of petitioner's restricted funds [income from his allotment] it having been decided that the income from the allotment is non-taxable (34 Ops. A. G. 275, published as T. D. 3570, C. B. III-I, p. 85).

In *Blackbird v. Commissioner* (C. C. A. 10) 38 F. (2d) 976, certiorari not requested, it was held that the income of a restricted Osage Indian, (without a certificate of com-

petency), was not within the purview of the income tax laws, the court stating (p. 978):

> "We cannot agree that because the income statute, Act of 1918 (40 Stat. 1057), and Act of 1921 (42 Stat. 227), subjects the net income of every individual to the tax, this is alone sufficient to make the Acts applicable to her."

2. The court below erred in concluding (R. 30):

> "While the question is not free from doubt, we are of the opinion that, as construed by the Supreme Court, the intent of Congress was to subject the income from investments of surplus funds, as well as the investments themselves, to taxation."

In 34 Ops. A. G. 275, it was held that income from allotments, such as petitioner's, was not subject to taxation. In making refunds under authority of this opinion, there arose the question as to whether the Government should invoke the provisions of the revenue laws requiring the filing of timely claims for refund. In answering this question in the negative, the then Attorney General (now Mr. Justice Stone) appropriately stated (34 Ops. A. G. 302, 305):

> "Moreover, inasmuch as *the income tax statutes do not apply to the class of Indians under discussion*, I see no reason why the limitation clauses therein contained relative to claims for refund or abatements should be invoked against them." (Italics supplied.)

and in 34 Ops. A. G. 439, 445 it was said:

> "In order to make this restriction against alienation properly effective, it would seem that *inalienability and nontaxability should go hand in hand*, at least until Congress clearly provides otherwise. At any rate, I am unable, by implication, to impute to Congress under the broad language of our Internal Revenue Acts an

> intent to impose a tax for the benefit of the Federal Government on income derived from the restricted property of these wards of the nation; property the management and control of which rests largely in the hands of officers of the Government charged by law with the responsibility and duty of protecting the interests and welfare of these dependent people. *In other words, it is not lightly to be assumed that Congress intended to tax the ward for the benefit of the guardian.*" (Italics supplied.)

In holding that the income derived from the restricted lands of the Kaw Indians is not subject to the federal income tax laws, the Attorney General (35 Ops. A. G. 1, 5) among other things said:

> "Whatever right the Act of May 27, 1924, may have conferred upon the State of Oklahoma to tax the mineral production of the lands of the Kaws, it cannot be taken as indicating an intention on the part of Congress to subject the income derived from these lands to Federal taxation. Such a wide departure from the prior legislative policy should not be assumed from doubtful implication, but should be recognized as existing only upon the enactment of legislation expressly so providing."

The majority below in deciding the question in the case:

> "which has not been before the Courts"

rely upon, *United States v. Gray* (C. C. A. 8) 284 F. 103, *United States v. Ransom* (C. C. A. 8) 284 F. 108; *United States v. Mummert* (C. C. A. 8) 15 F. (2d) 926; and *Shaw v. Oil Corporation* 276 U. S. 575; state that the restricted status of the lands in those cases did not exempt them from state taxation; that they could see no tenable distinction between land and personal property, and conclude (R. 30):

> "If Congress intended that such investments should be subject to state taxation, we can see no reason for

> holding that it intended to exempt the income from such investments from federal taxation."

In each of the cases relied upon by the court to support its conclusion, the lands purchased with restricted funds were at the time already taxable lands within the state. Under such circumstances, it is evident that exemption from taxation should not be implied. To exempt these taxable lands from state taxation merely because the Secretary of the Interior required that the deed of conveyance should provide for inalienability on the part of the Indian for a period of years, would, as this court pointed out in *Shaw v. Oil Corporation* at page 581 of 276 U. S.:

> "present the curious paradox that the Secretary by a mere conveyancer's restriction, permitted by Congress, had rendered the land free from taxation * * *"

On the other hand it has been decided in an unreported decision that where non-taxable, restricted lands are purchased with restricted funds under a deed imposing similar restrictions on the purchaser, such lands continue to be exempt from taxation. *Marble v. King*, et al., No. 900 Equity, decided August 1934 by the District Court, for the Northern District of Oklahoma. This decision was not appealed and is printed in appendix C of this brief, *infra*, (p. 22).

When restricted Indian property has always been non-taxable it is for Congress to state when and upon what conditions the property becomes taxable. In the instant case the tax exemption necessarily incident to such restricted property has not been removed or rendered taxable by any act of Congress. As stated by Judge Lewis in his dissent* (R. 33):

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*Judge Lewis' dissenting opinion on the merits appears in full in the appendix to this brief, *infra*, (p. 18). It will be noted that he suggests a question of jurisdiction as to whether the parties are adversaries in a case or controversy or whether being officers of the United States Government they are only seeking advisory instruction.

"It may also be conceded that Congress may confer on the Secretary of the Interior, or other officials, power to remove from the lands of an Indian exemption from taxation, and when so removed from such lands or other property it becomes subject to taxation by state and nation. *Action removing the exemption by either method expresses a clear intention by Congress to render the Indian's property subject to taxation. There could be no other intention.*" (Italics supplied.)

3. This question of Federal Taxation is not limited to

The relationship between the Government and Sandy Fox admittedly is that of guardian and ward. *Tiger v. Western Investment Co.* 221 U. S. 286. His property is under the immediate supervision of the Superintendent of the Five Civilized Tribes. (Stip. of Facts, R.10, Sec. 17, Ch. 222, Act of August 1, 1914, 38 Stat. 582,598).

By a ruling of the Bureau of Internal Revenue, a tax return was required by the Superintendent of the Five Civilized Tribes, for Sandy Fox; IT. 1366, C. B. I-I, Jan.-June, 1922, page 242, which provides in part:

> "In such a case the return should be made by the office of Indian Affairs, by its local superintendent or agent on behalf of the *Government as trustee* and the tax assessed upon such return should be paid by the superintendent or agent who makes the return." (Italics supplied.)

In the event the income in question is taxable this ruling is applicable for the year 1929 under Section 143 (a) of the Revenue Act of 1928, C. 852, 45 Stat. 791 which among other things provides that every fiduciary shall make a tax return for all individuals for whom he acts when the income is in excess of the credits properly allowable.

The style of this proceeding is governed by Rule 6 of the United States Board of Tax Appeals, which rule provides in part:

> "the proceedings shall be brought by and in the name of the person against whom the deficiency * * * is asserted by the Commissioner * * * If a fiduciary, both the names of the fiduciary and of the * * * other person for whom he acts shall be used."

In this case the notice of deficiency was directed to the Superintendent of the Five Civilized Tribes, for Sandy Fox, and the proceeding was properly instituted in that style. (See Board Tax Appeals discussion on this point 29 B. T. A. 635, 637, R. 13.) Fundamentally the question of taxation is between the United States and its ward, Sandy Fox. The fact that the Superintendent of the Five Civilized Tribes is a required party to the pleadings is incidental. The form is that prescribed by statute and arises solely from the relationship of guardian and ward. The existence of this guardianship is not an obstace to prevent the judicial determination of his rights.

members of the Five Civilized Tribes, but is of general interest to the restricted Indians, as it affects many others in the various tribes. It will apply to refunds or assessments for prior years, depending on whether tax returns have been filed, and will govern the tax status of restricted Indians for years to come. In addition to the Indians' interest, a compliance with the majority opinion below will cause considerable expense to the Bureau of Indian Affairs, including changes in the present methods of accounting at the various Agencies. It is, therefore, submitted that the importance of the question justifies a review by this Court.

CONCLUSION

For the reasons stated the writ prayed for should issue.

THOMAS J. REILLY,
F. M. GOODWIN,
MULLEN & SHEA,
Washington, D. C.
Attorneys for Petitioner.

March 26, 1935.

APPENDIX A

REVENUE ACT AND REGULATIONS INVOLVED

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 11. NORMAL TAX ON INDIVIDUALS.

There shall be levied, collected, and paid for each taxable year upon the net income of every individual a normal tax * * *

SEC. 12. SURTAX ON INDIVIDUALS.

(a) Rates of surtax. There shall be levied, collected, and paid for each taxable year upon the net income of every individual a surtax * * *

SEC. 22. GROSS INCOME.

(a) General definition. "Gross Income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property, also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

SUPPLEMENT E—ESTATES AND TRUSTS

SEC. 161. IMPOSITION OF TAX.

(a) Application of tax. The taxes imposed by this title upon individuals shall apply to the income of estates or of any kind of property held in trust, * * *

* * * * *

(4) Income which, in the discretion of the fiduciary, may be either distributed to the beneficiaries or accumulated.

(b) Computation and payment. The tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary, except as provided in section 166 (relating to revocable trusts) and Section 167 (relating to income for benefit of grantor). For return made by beneficiary, see Section 143.

SEC. 143. FIDUCIARY RETURNS.

(a) Requirement of return. Every fiduciary * * * shall make under oath a return for any of the following individuals, estates, or trusts for which he acts, stating specifically the items of gross income thereof and the deductions and credits allowed under this title.

(1) Every individual having a net income for the taxable year of $1,500 or over, if single, or if married and not living with husband or wife;

(2) Every individual having a net income for the taxable year of $3,500 or over, if married and living with husband or wife;

* * * * *

(4) Every estate or trust the net income of which for the taxable year is $1,500 or over; * * *

Treasury Regulation 74, promulgated under the Revenue Act of 1928:

Art. 741. Fiduciary returns. Every fiduciary, * * * must make a return of income—

(a) For the individual whose income is in his charge if the gross income of such individual is $5,000 or over, or if the net income of such individual is $1,500 or over if single or if married and not living with husband or wife, or if such individual is married and was living with husband or wife for the entire taxable year and the aggregate gross income of both husband and wife is $5,000 or over, or the aggregate net income of both husband and wife is $3,300 or over, or if such individual

is married and was living with husband or wife for a period less than the entire taxable year and the aggregate gross income of both husband and wife is equal to, or in excess of, the credit allowed them by section 25 (c) (2), or

(b) For the estate or trust for which he acts if the net income of such estate or trust is $1,500 or over, or if the gross income of the estate or trust is $5,000 or over, regardless of the amount of the net income, or if any beneficiary of such estate or trust is a nonresident alien.

The return in case (a) shall be on Form 1040 or 1040 A. In case (b) a return is required on Form 1040 with respect to any taxable net income of the estate or trust computed in accordance with Section 162 and a return on Form 1041 with respect to any income deducted under Section 162 (b) or (c). If a portion of the income of the estate or trust is retained by the fiduciary and the remainder is distributable or distributed to beneficiaries, both Forms 1040 and 1041 will be required. * * *

APPENDIX B

LEGISLATION PERTAINING TO TAXATION OF ALLOTTEES OF THE FIVE CIVILIZED TRIBES

Act of May 27, 1908, c. 199, 35 Stat. 312:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That from and after sixty days from the date of this Act the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows: All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood including minors shall be free from all restrictions. All lands, except homesteads, of said allottees enrolled as mixed-blood Indians having half or more than half and less than three-quarters Indian blood shall be free from all restrictions. All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood, including minors of such degrees of blood, and all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. The Secretary of the Interior shall not be prohibited by this Act from continuing to remove restrictions as heretofore, and nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this Act. * * *

Sec. 2. That all lands other than homesteads allotted to members of the Five Civilized Tribes from which

restrictions have been removed may be leased by the allottee if an adult, or by guardian or curator under order of the proper probate court if a minor or incompetent, for a period not to exceed five years, without the privilege of renewal: *Provided*, that leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise: • • •

• • • • •

Sec. 4. That all land from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes: *Provided*, That allotted lands shall not be subjected or held liable, to any form of personal claim, or demand, against the allottees arising or existing prior to the removal of restrictions, other than contracts theretofore expressly permitted by law.

• • • • •

Sec. 9. That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land, • • •

Act of May 10, 1928, 45 Stat. L. 495:

Sec. 3. That all minerals, including oil and gas produced on or after April 26, 1931, from restricted allotted lands of members of the Five Civilized Tribes in Oklahoma, or from inherited restricted lands of full blood heirs or devisees of such lands, shall be subject to all State and Federal taxes of every kind and character the same as those produced from lands of other citizens of the State of Oklahoma.

APPENDIX C

DISSENTING OPINION OF JUDGE LEWIS ON THE MERITS

Lewis, Circuit Judge.

I suggest a question of jurisdiction, and am inclined to the belief that power in this court to review the Board's order does not exist. We have this anomalous procedure: The Superintendent of the Five Civilized Tribes filed a petition for review. He is an officer in the Interior Department. Counsel who represent him were employed by the Interior Department. Respondent, Commissioner of Internal Revenue, is also an officer in an executive department of the government, and he is represented by counsel in that department. Petitioner contends that Sandy Fox, an Indian whom he professes to represent, and his property are not subject to an income tax, and respondent contends to the contrary. Is this a case or controversy over which this court has jurisdiction? In Old Colony Tr. Co. v. Comm'r. Int. Rev., 279 U. S. 715, the court in construing the act conferring jurisdiction on Circuit Courts of Appeal to review the orders of the Board of Tax Appeals quoted with approval this from the opinion of Mr. Justice Field in 32 Fed. 241, 255:

> "The judicial article of the Constitution mentions cases and controversies. * * * The term (case) implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication."

The Chief Justice then said:

> "The Circuit Court of Appeals is a constitutional court under the definition of such courts as given in

the Bakelite case, supra, and a case or controversy may come before it, provided it involves neither advisory nor executive action by it.

"In the case we have here, there are adverse parties. The United States or its authorized official asserts its right to the payment by a taxpayer of a tax due from him to the Government, and the taxpayer is resisting that payment or is seeking to recover what he has already paid as taxes when by law they were not properly due. That makes a case or controversy, and the proper disposition of it is the exercise of judicial power."

So the question arises whether the parties are adversaries in a case or controversy within our jurisdiction or whether being officers of the United States government they are only seeking advisory instructions.

But on the merits I disagree with the conclusion reached by my associates. The Act of May 27, 1908 (35 Stat. 312) applies to the Five Civilized Tribes. We held in Bagby v. United States, 60 F. (2) 80, and in Pitman v. Comm'r. Int. Rev., 64 F. (2) 740, that under the facts in each of those cases said act removed the restrictions from the allotments there under consideration, that such removal rendered each of said allotments subject to taxation, and that the rentals or royalties from said allotments were income subject to federal income tax. We further held in Chouteau v. Comm'r. Int. Rev., 38 F. (2) 976, that a certificate of competency issued to and held by Chouteau under section 2 of the Act of June 28, 1906 (34 Stat. 539) removed the restrictions from his allotment and perforce thereof from his income therefrom and rendered said income subject to federal taxation; that said certificate exempted Chouteau and his property from federal supervision, excepting his homestead; that it gave him full power to use and dispose of his property according to his own judgment and thus

there was imposed on him and he assumed the same burden as other individual property owners. The Supreme Court affirmed our judgment in the Chouteau case. Choteau v. Comm'r., 283 U. S. 691. It may also be conceded that Congress may confer on the Secretary of the Interior, or other officials, power to remove from the lands of an Indian exemption from taxation, and when so removed from such lands or other property it becomes subject to taxation by state and nation. Action removing the exemption by either method expresses a clear intention by Congress to render the Indian's property subject to taxation. There could be no other intention.

Sandy Fox, the taxpayer, is a full-blood Creek Indian enrolled as a member of that tribe under a given number. It was tipulated that he and his property, both real and personal, are restricted, and that his property is under the direct supervision of the Superintendent of the Five Civilized Tribes subject to the direction of the Secretary of the Interior; that income from his allotment is so received and held; that interest on such income when invested is likewise received and held in trust as a part of his restricted funds and property. There has been no removal of restrictions as to him or his property. Nevertheless the Board held said income to be taxable. I think the Board erred. We held to the contrary in Mary Blackbird v. Comm'r. Int. Rev., 38 F. (2) 976. I can add nothing to what we said in her case. She was a full blood member of the Osage tribe. Her property from which income was received was restricted, and she did not have a certificate of competency. Like Fox, she was a ward of the government of the United States, and, like him, she had no other guardian. We held she was not subject to the tax. I can see no material difference between her and her property on the one hand and Fox and his property on the other as to the point here involved. Not only does the majority opinion overrule the Mary Blackbird

case, it also disregards the wholesome doctrine of *stare decises*.

It is the duty of a trustee to invest funds in his hands. 1 Perry on Trusts, 5th Ed., Sec. 452. Interest received by him should be added to the trust estate. United States v. Brown, 8 F. (2) 567.

It is true that the rights and duties of citizenship were conferred on Fox by section 6 of the Act of February 8, 1887 (24 Stat. 388), as amended by the Act of March 3, 1901 (31 Stat. 1447); but it was appropriately said by the Eighth Circuit in United States v. Gray, 201 Fed. 291, 293:

> "The civil and political status of the Indians does not condition the power of the government to protect their property or to instruct them. Their admission to citizenship does not deprive the United States of its power, nor relieve it of its duty, to control their property, to protect their rights to it from the rapacity and faithlessness of the members of the superior race, to discharge faithfully its legal and moral obligations to them, and to execute every trust with which it is charged for their benefit."

See also National Bank v. Anderson, 147 Fed. 87, 90.

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE NORTHERN DISTRICT OF THE STATE OF OKLAHOMA

No. 900 Equity

L. H. MARBLE, *Plaintiff*,

vs.

JAMES KING, DOLLIE KING, HENRY KING, MRS. HENRY KING AND BOARD OF COUNTY COMMISSIONERS OF MAYES COUNTY, OKLAHOMA, *Defendants*,

UNITED STATES, *Intervenor*.

DECREE

Now on this the ..... day of August, the same being a day of the Special March 1934 Term of this Court, the above entitled cause comes on to be determined, plaintiff appearing by his attorney, R. A. Wilkerson, and the defendants, James King and Dollie King and the Intervenor, the United States, appearing by Chester A. Brewer, Assistant United States Attorney for the Northern District of Oklahoma; and said cause having been submitted to the Court on an agreed stipulation of facts and briefs of the parties hereto; and upon consideration of the pleadings and the agreed stipulation of facts and briefs of the respective parties herein the Court finds, adjudges and decrees as follows:

That James King is a full-blood, restricted Cherokee Indian, and is enrolled as such on the final authenticated Rolls of the Cherokee Nation opposite Roll No. 29681.

That as such full-blood, restricted Cherokee Indian he received a homestead allotment deed, approved by the Secretary of the Interior, conveying to him the following described land, to-wit:

> Northwest Quarter of Northeast Quarter and East Half of Northeast Quarter of Northwest Quarter and North Half of Northeast Quarter of Northeast Quarter and Southwest Quarter of Northeast Quarter of Northeast Quarter of Section 15, Township 21 North, Range 21 East, less roadway, located in Mayes County, Oklahoma.

That the restrictions of the said James King have not been removed except as hereinafter set out.

That Dollie King is a full-blood, restricted Cherokee Indian, and her name appears on said rolls opposite No. 25932. That on and prior to March 20, 1915, there was on deposit in the Indian Department, to the credit of the said Dollie King, the sum of $600.00 which had been placed to her credit in lieu of an allotment. That under the supervision of the Secretary of the Interior, and pursuant to his order, the said sum of $600.00 was invested in the land hereinabove described in behalf of the said Dollie King, and said sum was used to pay the full purchase price of said land to James King. That said James King, under the supervision of the Secretary of the Interior, executed to Dollie King a warranty deed conveying said land which deed was approved by the Secretary of the Interior. That said deed contained a restrictive clause, restricting said land against alienation without the approval of the Secretary of the Interior. That the Secretary of the Interior conditionally removed the restrictions against the alienation of said land for the purpose only of the execution of the deed from James King to Dollie King.

The Court further finds that the above described land was not subject to taxation on March 20, 1915, or prior thereto. That said land was placed on the tax rolls of Mayes Country, Oklahoma, for the year 1916 and subsequent years, and was sold to Mayes County,

Oklahoma, for taxes at a resale tax sale. That thereafter a deed was issued and delivered to the plaintiff, L. H. Marble, by the Chairman of the Board of County Commissioners of Mayes County, Oklahoma, conveying to the said L. H. Marble the land hereinbefore described.

The Court further finds that the $600.00 which was paid by Dollie King to James King as a consideration for the land involved herein were trust funds and under the supervision and control of the Secretary of the Interior. That the land involved was not, at the time of the execution of the deed by James King to Dollie King, subject to taxation by the State of Oklahoma, and has not been subject to taxation by the State of Oklahoma at any time since or prior thereto.

The Court further finds that the plaintiff, L. H. Marble, voluntarily paid the sum of $90.00 to Mayes County, Oklahoma, for a tax deed to said land and voluntarily expanded the sum of $5.00 in procuring said tax deed; that in said action the plaintiff made the Board of County Commissioners of Mayes County, Oklahoma, a party defendant and asked for judgment against it for the sum of $95.00 together with the costs of this action. The Court further finds that the said Board of County Commissioners of Mayes County, Oklahoma, was duly served with summons in said cause; that it has made default and is now in default in said action. That in addition to the said service of summons, the plaintiff has caused notice to be given to the acting County Attorney of Mayes County, Oklahoma, that he would ask for judgment against said Board of County Commissioners for the said sum of $95.00 together with the costs of said cause.

The Court further finds that by reason of the foregoing the plaintiff, L. H. Marble, is not entitled to the relief prayed for in the bill of complaint as to the defendants James King, Dollie King, Henry King and Mrs. Henry King, and that the title to said land should be quieted in the defendant Dollie King free and clear of all rights and claims of the plaintiff. That as against the defendant, Board of County Commissioners

of Mayes County, Oklahoma, the plaintiff is entitled to judgment in the sum of $95.00 and for the costs of said cause.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the plaintiff, L. H. Marble, be and he hereby is denied the relief prayed for in the bill of complaint herein as against the defendants, James King, Dollie King, Henry King and Mrs. Henry King, and that the tax deed under which said plaintiff claims title to the following described real property situated in Mayes County, Oklahoma, to-wit:

> Northwest Quarter of Northeast Quarter and East Half of Northeast Quarter of Northwest Quarter and North Half of Northeast Quarter of Northeast Quarter and Southwest Quarter of Northeast Quarter of Northeast Quarter of Section 15, Township 21 North, Range 21 East, less roadway

which said deed was dated December 5, 1932, and recorded December 12, 1932, in Book 180 at Page 426 of the records of said County, be and the same is hereby cancelled, set aside and held for naught. It is further ordered, adjudged and decreed that all taxes levied against the above described restricted land for the years 1918 to 1929 inclusive be and they are hereby declared null and void and cancelled; that the title to the land hereinabove described be and the same is hereby quieted in the name of Dollie King, a full-blood restricted Cherokee Indian, Roll No. 25932.

IT IS THE FURTHER ORDER OF THE COURT that the plaintiff, L. H. Marble, have and recover of and from said Board of County Commissioners of Mayes County, Oklahoma, the sum of $95.00 together with the costs of this cause.

FILE COPY

IN THE

Supreme Court of the United States

October Term, 1954.

No. 317.

SUPERINTENDENT FIVE CIVILIZED TRIBES, FOR SAMUEL FOX, Claim No. 1263, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

BRIEF FOR THE PETITIONER.

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INDEX.

	Page
Opinion below	1
Jurisdiction	2
Question presented	2
Statutes and regulations involved	2
Statement	2
Specification of errors to be urged	4
Summary of argument	5
Argument	6
I. The status of petitioner's property is governed by the Act of May 27, 1908 (35 Stat. 312), and as his property has not been made taxable by that Act, or any other Act of Congress, it remains non-taxable	6
II. The Revenue Act of 1928 being a general Act of Congress does not apply to petitioner. As to him a tax levied by the Federal Government is inconsistent with its policy toward him as protector and conservator	9
III. The opinion of the Court below disregards the doctrine of *stare decisis* by overruling its earlier decision in *Blackbird* v. *Commissioner*, 38 F. (2d) 976, and the decisions relied upon by the Court to support its conclusion are not in point	12
Conclusion	17
Appendix A	18
Appendix B	21

CITATIONS

Cases:

Bagby v. United States, 60 F. (2d) 80 ..... 5, 16, 17
Blackbird v. Commissioner, 38 F. (2d) 976, reversing 14 B. T. A. 1247 ..... 4, 5, 12, 15
Choate v. Trapp, 224 U. S. 665 9

Cases—continued: Page

Choteau v. Burnet, 283 U. S. 691, affirming 38 F. (2d) 976 ..... 8, 14, 15
Elk v. Wilkins, 112 U. S. 94 ..... 9, 12
Ex parte Crow Dog, 109 U. S. 556 9
Fink v. County Commissioners, 248 U. S. 399 8
Parker v. Richard, 250 U. S. 235 7
Pitman v. Commissioner, 64 F. (2d) 740 ..... 5, 16, 17
Shaw v. Oil Corporation, 276 U. S. 575 ..... 9, 14
Snell v. Commissioner, 10 B. T. A. 1081 4
United States v. Gray, 284 Fed. 103 14
United States v. Homeratha, 40 F. (2d) 305; appeal dismissed by stipulation, 49 F. (2d) 1086 13
United States v. Mummert, 15 F. (2d) 926 14
United States v. Quiver, 241 U. S. 602 9
United States v. Ransom, 284 Fed. 108 14

Statutes:

Act of March 3, 1893, 27 Stat. 612 21
Act of June 28, 1898, 30 Stat. 495 6
Act of March 1, 1901, 31 Stat. 861 ..... 6, 22
Act of June 30, 1902, 32 Stat. 500 23
Act of April 21, 1904, 33 Stat. 189 7
Act of April 26, 1906, 34 Stat. 137 7
Act of May 27, 1908, 35 Stat. 312 ..... 5, 6, 7, 8, 9, 16
Act of May 25, 1918, 40 Stat. 561 3
Act of April 12, 1926, 44 Stat. 239 7
Act of May 10, 1928, 45 Stat. 495 7
Act of January 27, 1933, 47 Stat. 777 27

Miscellaneous:

34 Ops. A. G. 275 ..... 3, 4, 5, 10
34 Ops. A. G. 302 10
34 Ops. A. G. 439 11
35 Ops. A. G. 1 11
I. T. 1366, C. B., I-1 Jan.-June, 1922, p. 242 10
I. T. 1730, C. B., II-2, July-Dec., 1923, p. 55 11
I. T. 1834, C. B., II-2, July-Dec., 1923, p. 62 12
L. O. 1098, C. B., I-1, Jan.-June, 1922, p. 64 11
T. D. 3570, C. B., III-1, Jan.-June, 1924, p. 85 3
T. D. 3754, C. B., IV-2, July-Dec., 1925, p. 37 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 817.

SUPERINTENDENT FIVE CIVILIZED TRIBES, FOR SANDY FOX, CREEK NO. 1263, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

BRIEF FOR THE PETITIONER.

OPINION BELOW.

The opinion of the United States Board of Tax Appeals (R. 11-18) is reported in 29 B. T. A. 635. The opinions of the Circuit Court of Appeals (R. 23-32) are reported in 75 F. (2d) 183.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered January 9, 1935 (R. 32). The petition for a writ of certiorari was filed March 26, 1935, and the writ was granted April 15, 1935 (R. 33). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

Petitioner is a restricted, full-blood member of the Five Civilized Tribes. His property, both real and personal, is restricted and held in trust by the Secretary of the Interior. His "restricted funds" (income from his allotment) by direction of the Secretary of the Interior is invested by the Superintendent of the Five Civilized Tribes and the income from such investments is likewise received and held in trust as part of petitioner's "restricted funds".

The question is whether the income from these investments—"reinvested income"—is subject to a Federal Income Tax.

STATUTES AND REGULATIONS INVOLVED.

The pertinent parts of the Revenue Act involved will be found in Appendix A, *infra*, pp. 18-20. The pertinent statutes relating to taxation of members of the Five Civilized Tribes will be found in Appendix B, *infra*, pp. 21-27.

STATEMENT.

The facts in the case were stipulated (R. 9-10), and may be summarized as follows:

Sandy Fox is a full-blood, restricted Creek Indian, whose property both real and personal is under the supervision and control of the Secretary of the Interior and the Superintendent of the Five Civilized Tribes. The income from his allotment is received and held in trust by the said Superin-

tendent and invested by him under the direction of the Secretary of the Interior. The income interest from such investments[1] is likewise received and held in trust as part of Fox's restricted funds and property. (R. 9-10).

For the calendar year 1929 the Superintendent filed for Sandy Fox an income tax return and paid a tax of $102.59 from the restricted funds in his possession. Reported in this return for 1929 was an item of income in the sum of $7,797.42 received by said Superintendent as interest from the investment of petitioner's restricted funds. The return also included an item of $8,351.75 received by the said Superintendent as interest on Liberty Bonds held by him as part of Fox's restricted funds. Both of these items of income, in turn, became a part of Sandy Fox's restricted funds (R. 10).

During the year 1929, the Respondent under authority of 34 Ops. A. G. 275, published as Treasury Decision 3570, Cumulative Bulletin III-I, p. 85, refunded to said Superintendent for Fox, taxes, erroneously paid by the Superintendent on the income from Fox's allotment, with interest as provided by law:

Year	Tax	Interest
1914.....	$95.43	$79.15
1915.....	858.24	637.60
1916.....	3,396.31	2,400.75
Total	$4,349.98	$3,117.50

This interest in the sum of $3,117.50 is also a part of Sandy Fox's restricted funds and was not included in his tax return for 1929. The Respondent, however, increased the income reported on the return by this sum and determined a deficiency of $167.00 (R. 10).

[1] By the Act of May 25, 1918, 40 Stat. 592, sec. 28, *infra*, p. 26, the funds of Sandy Fox are required to be deposited in the banks of Oklahoma or in the United States Treasury and may be secured by the deposit of United States bonds.

In a review before the Board of Tax Appeals petitioner resisted the deficiency thus asserted and sought a recovery of the taxes previously paid on the theory that he was not subject to the federal income tax laws in respect to the income in question. It was urged that *Blackbird* v. *Commissioner* (C. C. A. 10), 38 F. (2d) 976, reversing 14 B. T. A. 1247, authoritatively adjudicated the question involved; that the decision in the Blackbird case is consonant with a series of Attorney General Opinions beginning with 34 Ops. A. G. 275, and that the Solicitor General did not seek a review of that decision by this Court. The Board's attention was also directed to the hundreds of cases wherein it entered orders of "no deficiency" in cases similar to that of Mary Blackbird. However, the Board of Tax Appeals denied petitioner's contention 29 B. T. A. 635 (R. 11-18), and approved the deficiency asserted by the Respondent on authority of its earlier decision in *Snell* v. *Commissioner*, 10 B. T. A. 1081.

The Circuit Court of Appeals, by a divided court, (R. 23-32) affirmed the order of the Board of Tax Appeals and by so doing in effect overruled the decision in *Blackbird* v. *Commissioner*, *supra*.

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

1. In holding that Congress intended to impose an income tax on the income received and held in trust by the Superintendent of the Five Civilized Tribes, when the income arises from the investment by him, subject to the direction to the Secretary of the Interior, of a restricted, full-blood Indian's restricted property.

2. In holding that its earlier decision in *Blackbird* v. *Commissioner*, 38 F. (2d) 976 did not decide the question presented.

3. In affirming the order of the United States Board of Tax Appeals.

SUMMARY OF ARGUMENT.

This case relates to the taxability of income received and held in trust by the Superintendent of the Five Civilized Tribes. The income arises from the investment by him, subject to the direction of the Secretary of the Interior, of a restricted Indian's restricted funds.

In a series of opinions of the Attorney General, beginning with 34 Ops. A. G. 275, it has been held that income from allotments, such as Sandy Fox's, was not subject to federal taxation; that the federal income tax statutes do not apply to this class of Indians; that inalienability and nontaxability go hand in hand; and that it is not lightly to be assumed that Congress intended to tax the ward for the benefit of the guardian. These same views, in substance, were also enunciated by the Court below in holding nontaxable, the income of a restricted Osage Indian, *Blackbird* v. *Commissioner*, 38 F. (2d) 976.

Restrictions applicable to the property of the members of the Five Civilized Tribes is governed, primarily, by the Act of May 27, 1908 (35 Stat. 312). Broadly stated by section 4 of that Act and conditioned upon the removal of restrictions, the lands and the income therefrom become subject to taxation, state and federal. This has been the holding of the Court below in two cases, viz., *Bagby* v. *United States*, 60 F. (2d) 80, and *Pitman* v. *Commissioner*, 64 F. (2d) 740.

In the instant case restrictions have not been removed as to Sandy Fox's property. To the contrary it is administered by the Superintendent of the Five Civilized Tribes, by direction of the Secretary of the Interior. This trusteeship was created by Acts of Congress dealing specially with the affairs of the members of the Five Civilized Tribes. The income from the trust, upon which this controverted tax has been asserted, arises as a necessary incident to the proper discharge of the duty assumed by Congress. Under these circumstance we feel the Court below erred in hold-

ing the income of this trust was subject to federal taxation by virtue of the general taxing provisions of the Revenue Act of 1928. The correct view is expressed in the opinions of the Attorney General; in the dissenting opinion of Judge Lewis in this case; and in the decision of the Court below in *Blackbird* v. *Commissioner, supra.*

ARGUMENT.

Sandy Fox is a full-blood, restricted Creek Indian. All his property, both real and personal, is restricted and is held in trust by the Federal Government. By direction of the Secretary of the Interior his restricted trust funds are invested under Government supervision by the Superintendent of the Five Civilized Tribes, and the income from these investments is likewise received and held in trust by the said Superintendent, subject to reinvestment or other expenditure by the Federal Government for the benefit of Sandy Fox.

I.

The status of petitioner's property is governed by the Act of May 27, 1908, 35 Stat. 312, and as his property has not been made taxable by that act or any other act of Congress, it remains nontaxable.

Due to conditions at the time and since the Federal Government was established, its relations with the Indians have been of a complex nature, including the dealings of our Government with the Muscogee or Creek Tribe of Indians of which Sandy Fox is a member. By agreement and force this Tribe was induced to abandon its home in the East and move to its new home in Indian Territory—title to the lands thus acquired being vested in the Tribe with a reversionary interest retained by the United States.

By the act of June 28, 1898, 30 Stat. 495 (Curtis Act) and the Act of March 1, 1901, 31 Stat. 861, (Original Creek

Agreement), allotments in severalty were made of this tribal property. Restrictions on alienation were imposed on all the lands of allottees for a period of five years, but as to non-Indian allottees restrictions were removed on the surplus lands immediately upon the enactment of the Act of April 21, 1904, 33 Stat. 189. As to full-blood Indians alone restrictions were extended until April 26, 1931,[2] by the Act of April 26, 1906. This Act also provided for the removal of restrictions on all inherited property of heirs of less than full-blood.

The Act of May 27, 1908 (35 Stat. 312), superseded all prior legislation affecting restrictions upon the alienation of allotted lands of members of the Five Civilized Tribes. It set up its own complete plans as to the removal of restrictions and further provided that upon the removal of restrictions the property became subject to taxation. By section 1 thereof restrictions were removed on all lands of allottees of less than half-blood and on the surplus lands of all allottees of more than half but less than three-quarters blood. And by section 9[3] restrictions on an allottee's property were removed by his death, but as to the interest inherited by full-blood heirs the restrictions were only relaxed.

Thus, it will be seen that Congress, from time to time, has maintained the restrictions on the property of full-blood allottees, relaxing to a certain extent the restrictions on inherited property. Restrictions have also been maintained on the property of those of three-quarters but less than full-blood; except as to inherited property, restrictions on which have been entirely removed. As to all other allottees, beginning first with non-Indian allottees, restrictions have been entirely removed, except as to the homesteads of those of more than one-half but less than three-quarters Indian blood. As the quantum of Indian blood diminishes,

[2] Now extended to April 26, 1956, by the Act of May 10, 1928, 45 Stat. 495, *infra*, p. 26.

[3] *Parker* v. *Richard*, 250 U. S. 235, 238. See also Act of April 12, 1926, 44 Stat. 239, *infra*, p. 26.

so has the reason for the restrictions. In addition, the Secretary of the Interior may remove, wholly or in part, the restrictions not otherwise removed by statute. As stated by this Court in *Fink* v. *County Commissioners*, 248 U. S. 399, 403, the purpose of the Act of May 27, 1908, *supra*, in removing restrictions on property,

> "was to give to the Indian all of the attributes of ownership, to give him a mastery of his property equal to that of other owners of property, and nothing more, and this consummated the new policy of Congress."

This Court also reviewed the policy of Congress respecting the taxation of its Indian wards in *Choteau* v. *Burnet*, 283 U. S. 691. In sustaining a tax imposed upon the income of an Osage Indian, whose property was unrestricted by virtue of the Indian having received a certificate of competency under the Act of June 28, 1906 (34 Stat. 539), it was there said at page 694:

> "* * * the plan of the government has been gradually to emancipate the Indian from his former status as a ward; to prepare him for complete independence by education and the gradual release of his property to his own individual management. This plan has included imposing upon him both the responsibilities and the privilege of the owner of property, including the duty to pay taxes."

But in the present case, Sandy Fox does not possess the responsibilities and the privilege of a property owner. As to him emancipation has not begun. His property, both real and personal, is restricted and under the supervision and control of the Secretary of the Interior. Respecting his property, we submit, the proper rule of taxation applicable is that stated by Judge Lewis in his dissenting opinion (R. 31).

> "It may also be conceded that Congress may confer on the Secretary of the Interior, or other officials, power

> to remove from the lands of an Indian exemption from taxation, and when so removed from such lands or other property it becomes subject to taxation by state and nation. Action removing the exemption by either method expresses a clear intention by Congress to render the Indian's property subject to taxation. There could be no other intention."

As to these wards of the Federal Government inalienability and non-taxability are natural concomitants, otherwise involuntary sales of property to satisfy tax obligations could be effected. It was upon the removal of restrictions alone (unless a right of non-taxability existed by treaty or contract)[4] that Congress subjected an Indian's lands to any form of taxation and this construction is specifically enacted as section 4 of the Act of May 27, 1908, *supra*.[5]

Here, petitioner's property is restricted and has not been made subject to taxation either by section 4 of the Act of May 27, 1908, *supra*, or by any other Act of Congress. It therefore remains non-taxable.

II.

The Revenue Act of 1928 being a general Act of Congress does not apply to petitioner. As to him a tax levied by the Federal Government is inconsistent with its policy toward him as protector and conservator.

This Court in the case of *Elk* v. *Wilkins*, 112 U. S. 94, 100, held:

> "General Acts of Congress do not apply to Indians unless so expressed as to clearly manifest an intention to include them."

To the same effect are the decisions of this Court in *Ex parte Crow Dog*, 109 U. S. 556, 570, and *United States* v. *Quiver*, 241 U. S. 602, 606.

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[4] *Choate* v. *Trapp*, 224 U. S. 665, 675.
[5] *Shaw* v. *Oil Corporation*, 276 U. S. 575, 581.

The Revenue Act of 1928[6] is a general Act of Congress and the income involved results from the investment by a federal officer of a restricted Indian's restricted funds in his possession—a duty essential to the proper discharge of his trusteeship. Under such conditions the question presented is essentially the same as that under review in 34 Ops. A. G. at page 279. There the asking of several questions was to answer them consistent with the position taken by the petitioner here.

> "While these funds (incomes) are in the hands of the Federal Government, kept in the United States Treasury and not paid out or pledged except under the consent of the Government, a State has no right to tax them. If, a State can not tax them, the question arises, is it proper or legal for the Federal Government to tax them? Is it consistent for it to guard this income from the State taxing power and surrender it to Congressional authority? Would such procedure be consistent with its policy toward the Indian as protector and conservator?"

In making refunds under authority of this opinion of the Attorney General, there arose the question as to whether the Government should invoke the provisions of the Revenue laws requiring the filing of timely claims for refund. In answering this question in the negative, the Attorney General further stated, 34 Ops. A. G. 302, 305:

> "Moreover, in as much as *the income tax statutes do not apply to the class of Indians under discussion,* I

[6] By a ruling of the Bureau of Internal Revenue, a tax return was required by the Superintendent of the Five Civilized Tribes, for Sandy Fox; IT: 1366, C. B. I-I, Jan.-June, 1922, page 242, which provides in part:

> "In such a case the return should be made by the office of Indian Affairs, by its local superintendent or agent on behalf of the *Government as trustee* and the taxes assessed upon such return should be paid by the superintendent or agent who makes the return." (Italics ours.)

In the event the income in question is held taxable this ruling is applicable to the year 1929 under section 143 (a) of the Revenue Act of 1928, c. 852, 45 Stat. 791, which among other things provides that every fiduciary shall make a tax return for all individuals for whom he acts when the income is in excess of the credits properly allowable.

see no reason why the limitations clauses therein contained relative to claims for refund or abatements should be invoked against them." (Italics supplied.)

and in 34 Ops. A. G. 439,[1] 445, it was said:

> "In order to make this restriction against alienation properly effective, it would seem that *inalienability and nontaxability should go hand in hand,* at least until Congress clearly provides otherwise. At any rate, I am unable, by implication, to impute to Congress under the broad language of our Internal Revenue Acts an intent to impose a tax for the benefit of the Federal Government on income derived from the restricted property of these wards of the nation; property the management and control of which rests largely in the hands of Officers of the Government charged by law with the responsibility and duty of protecting the interests and welfare of these dependent people. *In other words, it is not lightly to be assumed that Congress intended to tax the ward for the benefit of the guardian.*" (Italics supplied.)

In holding that the income derived from the restricted lands of the Kaw Indians was not subject to the Federal Income Tax laws, the Attorney General (35 Ops. A. G. 1, 5) among other things said:

> "Whatever right the Act of May 27, 1924, may have conferred upon the State of Oklahoma to tax the mineral production of the lands of the Kaws, it cannot be taken as indicating an intention on the part of Congress to subject the income derived from these lands to Federal taxation. Such a wide departure from the prior legislative policy should not be assumed from doubtful implication, but should be recognized as existing only upon the enactment of legislation expressly so providing."

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[1] This opinion of the Attorney General was published as Treasury Decision 3754, Cumulative Bulletin, IV-2, July-Dec. 1925, page 37. It is contrary to and superseded earlier rulings of the Bureau of Internal Revenue, namely I. T. 1730, Cumulative Bulletin II-2, July-Dec. 1923, p. 55 and L. O. 1098, Cumulative Bulletin I-1, Jan.-June 1922, page 64.

Clearly the opinions of the Attorney General are in harmony with the opinion of this Court in *Elk* v. *Wilkins, supra;* with the decision of the Court below in *Blackbird* v. *Commissioner, supra;* and with the position of petitioner. Further, none of the opinions of the Attorney General have been revoked or rescinded. It must be assumed that subsequent enactments by Congress of the same language in matters of Internal Revenue Taxation were with the presumed knowledge and ratification of the construction placed upon such language by the Attorney General.

III.

The opinion of the court below disregards the doctrine of stare decisis by overruling its earlier decision in Blackbird v. Commissioner, 38 F. (2d) 976, and the decisions relied upon by the court to support its conclusion are not in point.

As a result of the series of Attorney General opinions hereinbefore referred to, there was refunded to the various members of the tribes of Indians affected taxes previously paid. These opinions, however, were not applied by the Respondent to the income of restricted Osage Indians,* and as to them, it was necessary to litigate the question of federal taxation before the Circuit Court of Appeals for the Tenth Circuit. The case selected was *Blackbird* v. *Commissioner*, 38 F. (2d) 976, and the Court in reversing 14 B. T. A. 1247, stated at page 978:

> "She and the other petitioners contend that they are not only not liable for the amounts named under the deficiency orders but that they are not subject to the income tax statute. As to Mary Blackbird, we are disposed to yield our assent to the soundness of the contention. She is a restricted full-blood Osage. Her

* The ruling of the Bureau of Internal Revenue holding restricted Osage Indians taxable is published as I. T. 1834, Cumulative Bulletin II-2, July-Dec. 1923, page 62. It was published prior to the opinions of the Attorney General cited herein.

> property is under the supervising control of the United States. She is its ward, and we cannot agree that because the income statute, Act of 1918 (40 Stat. 1057), and Act of 1921 (42 Stat. 227), subjects 'the net income of every individual' to the tax, this is alone sufficient to make the Acts applicable to her."

The Solicitor General did not petition this Court for a writ of certiorari in the "Blackbird" case and as a result all taxes paid by the restricted members of the Osage Tribe of Indians were refunded.

In the instant case the majority of the Court below express the view that the question for decision was not governed by the principle enunciated in the Blackbird case. With this we disagree, believing that Judge Lewis in his dissenting opinion (R. 32) correctly states:

> "Not only does the majority opinion overrule the Mary Blackbird case, it also disregards the wholesome doctrine of *stare decisis*."

The same conclusion is also expressed by the Solicitor General at page 2 of his Memorandum, wherein the petition for a writ of certiorari in this case was not opposed.

It is clear that the majority of the Court below, in holding that the income received by the Superintendent of the Five Civilized Tribes, for Sandy Fox was taxable, did not consider as a unit the status of Fox respecting the income involved together with the relationship that exists between him and the Federal Government. To the contrary the Court supports its conclusion on three unrelated premises (R. 28) none of which are pertinent to the issue presented. They are:

1. Congress did not intend to exempt Indians as such from Federal taxation.

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[9] The rule laid down in the Blackbird case was also applied in *United States* v. *Homeratha*, 40 F. (2d) 305, 306; appeal dismissed by stipulation 49 F. (2d) 1086.

2. Congress did not intend to exempt restricted property as such from state taxes.

3. Property acquired for investment is not a federal instrumentality in the sense the original allotment is.

The first premise was said by the Court below to be supported by the decision of this Court in *Choteau* v. *Burnet*, 283 U. S. 691. In that case Choteau, an Osage Indian had received a certificate of competency under the Act of June 28, 1906 (34 Stat. 539). The income in question was received by him and was clearly beyond the control of the United States. His right to receive and use it was absolute, this Court stating at page 696 of 283 U. S.:

> "The claim that with respect to this income the petitioner was restricted, and therefore exempt from the tax laid by sections 210 and 211 (a) [40 Stat. 1062] must fail."

The second premise was said by the Court below to be supported by *United States* v. *Gray*, 284 Fed. 103; *United States* v. *Ransom*, 284 Fed. 108; *United States* v. *Mummert*, 15 F. (2d) 926; and by *Shaw* v. *Oil Corporation*, 276 U. S. 575. In each of these cases taxable lands within a state were purchased by the Secretary of the Interior with restricted funds of an Indian. To exempt these taxable lands from state taxation merely because the Secretary of the Interior required that the deed of conveyance should provide for inalienability without his consent for a period of years, would, as this Court pointed out in *Shaw* v. *Oil Corporation* at page 581 of 276 U. S.:

> "present the curious paradox that the Secretary by a mere conveyancer's restriction, permitted by Congress, had rendered the land free from taxation * * *"

The third premise was said by the Court below to be also supported by *Shaw* v. *Oil Corporation, supra*. In that case

the Oil Corporation was the lessee of taxable lands purchased by the Secretary of the Interior with accumulated royalties derived from the restricted lands of a full-blood Indian; and the State of Oklahoma asserted a gross production tax upon the corporation. In upholding this tax this Court held the interest of the lessee in the lands was not such a federal instrumentality as to exempt the corporation from the tax.

From these irrelevant premises we submit that the majority opinion below erroneously concluded (R. 28):

> "While the question is not free from doubt, we are of the opinion that, as construed by the Supreme Court, the intent of Congress was to subject the income from investments of surplus funds, as well as the investments themselves, to taxation."

We feel none of the premises relied upon by the Court below are in point; first, the present case does not involve an Indian with the status respecting the income in question as that considered in *Choteau* v. *Burnet, supra*; second, it does not involve the right of the Secretary of the Interior by a conveyancer's restriction to exempt from state taxation land previously taxed by the state; and third, it does not involve the right of a state to tax a federal instrumentality.

Here, restrictions imposed by Federal law exist as to Sandy Fox and all his property, both real and personal. The question is whether the Revenue Act of 1928 imposes a Federal Income Tax upon the income received and held in trust by a Federal Officer from investments made by him of a restricted Indian's restricted funds in his possession. The answer to this question, we submit, is properly controlled by the expressions of the Court below in *Blackbird* v. *Commissioner*, at page 978 of 38 F. (2d):

> "We cannot agree that because the income statute, Act of 1918 (40 Stat. 1057), and the Act of 1921 (42 Stat.

227), subjects the net income of every individual to the tax, this is alone sufficient to make the Acts applicable to her."

The principle expressed above was also the basis of two later decisions of the Court below and each of those cases involved Federal Income Taxes asserted against members of the Five Civilized Tribes. In *Bagby* v. *United States*, 60 F. (2d) 80, affirming 53 F. (2d) 260; and in *Pitman* v. *Commissioner*, 64 F. (2d) 740, reversing in part 24 B. T. A. 244, taxes were held to be properly imposed not because general revenue acts applied to all Indians, but because the property producing the income had been made taxable by section 4 of the Act of May 27, 1908 (35 Stat. 312). In the *Bagby case*, *supra*, it was said at page 81 of 60 F. (2d):

> "If it clearly appears from said Act [Act of May 27, 1908] *and* the Revenue Act of 1918 (40 Stat. 1057) that Congress intended to subject her income to the tax the assessment was not erroneous and illegal." (Italics ours.)

And in the *Pitman case*, *supra*, at page 742 of 64 F. (2d):

> "On the removal of such restrictions, such lands and the income therefrom became subject to taxation under the provisions of Section 4 of such Act. [Act of May 27, 1908]
>
> * * * * * * * *
>
> "The homestead portion of the allotment, however, remained subject to the restrictions provided by Sec. 1, *supra*, until the death of Pitman, Jr., the original allottee. Upon his death it passed by inheritance to the petitioner, a full-blood Indian heir, and became subject to the qualified restrictions imposed by Sec. 9, *supra*, and remained exempt from taxation. *Parker v. Richard*, 250 U. S. 235, 238, 39 S. Ct. 442, 63 L. Ed. 954; *Marcy* v. *Board of Commissioners*, 45 Okla. 1, 144 P. 611; *United States* v. *Shock* (C. C. Okl.) 187 F. 870."

The doctrine so unequivocably expressed in the Bagby and Pitman cases, *supra*, should not be enlarged.

There is no legal warrant for the assumption made by the majority of the Court below that the general terms of the Revenue Act of 1928, contrary to the consistent views heretofore held by the Attorney General and the Courts, should supersede the specific legislation of Congress dealing with Indian affairs. Congress by special legislation has restricted the property and the income of Sandy Fox. If these restrictions and the concomitant tax exemptions are to be removed, it should be done by legislation directed to that purpose, and not by judicial construction without recourse to the Congress which alone has the right to change the National policy toward these wards of the Government.

CONCLUSION.

It is respectfully submitted that the decision of the Court below is erroneous and should be reversed.

THOMAS J. REILLY,
F. M. GOODWIN,
ARTHUR F. MULLEN,
GEORGE F. SHEA,
Attorneys for Petitioner.

April 23, 1935.

APPENDIX A.

REVENUE ACT AND REGULATIONS INVOLVED

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 11. NORMAL TAX ON INDIVIDUALS.

There shall be levied, collected, and paid for each taxable year upon the net income of every individual a normal tax * * *

SEC. 12. SURTAX ON INDIVIDUALS.

(a) Rates of surtax. There shall be levied, collected, and paid for each taxable year upon the net income of every individual a surtax * * *

SEC. 22. GROSS INCOME.

(a) General definition. "Gross Income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property, also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

SUPPLEMENT E—ESTATES AND TRUSTS

SEC. 161. IMPOSITION OF TAX.

(a) Application of tax. The taxes imposed by this title upon individuals shall apply to the income of estates or of any kind of property held in trust, * * *

* * * * *

(4) Income which, in the discretion of the fiduciary, may be either distributed to the beneficiaries or accumulated.

(b) Computation and payment. The tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary, except as provided

in section 166 (relating to revocable trusts) and Section 167 (relating to income for benefit of grantor). For return made by beneficiary, see Section 143.

SEC. 143. FIDUCIARY RETURNS.

(a) Requirement of return. Every fiduciary * * * shall make under oath a return for any of the following individuals, estates, or trusts for which he acts, stating specifically the items of gross income thereof and the deductions and credits allowed under this title.

(1) Every individual having a net income for the taxable year of $1,500 or over, if single, or if married and not living with husband or wife;

(2) Every individual having a net income for the taxable year of $3,500 or over, if married and living with husband or wife;

* * * * * *

(4) Every estate or trust the net income of which for the taxable year is $1,500 or over; * * *

Treasury Regulation 74, promulgated under the Revenue Act of 1928:

Art. 741. Fiduciary returns. Every fiduciary, * * * must make a return of income—

(a) For the individual whose income is in his charge if the gross income of such individual is $5,000 or over, or if the net income of such individual is $1,500 or over if single or if married and not living with husband or wife, or if such individual is married and was living with husband or wife for the entire taxable year and the aggregate gross income of both husband and wife is $5,000 or over, or the aggregate net income of both husband and wife is $3,500 or over, or if such individual is married and was living with husband or wife for a period less than the entire taxable year and the aggregate gross income of both husband and wife is equal to, or in excess of, the credit allowed them by section 25 (e) (2), or

(b) For the estate or trust for which he acts if the net income of such estate or trust is $1,500 or over, or

if the gross income of the estate or trust is $5,000 or over, regardless of the amount of the net income, or if any beneficiary of such estate or trust is a non-resident alien.

The return in case (a) shall be on Form 1040 or 1040 A. In case (b) a return is required on Form 1040 with respect to any taxable net income of the estate or trust computed in accordance with Section 162 and a return on Form 1041 with respect to any income deducted under Section 162 (b) or (c). If a portion of the income of the estate or trust is retained by the fiduciary and the remainder is distributable or distributed to beneficiaries, both Forms 1040 and 1041 will be required. • • •

APPENDIX B.

Legislation Pertaining To The Five Civilized Tribes.

Act of March 3, 1893, c. 209, 27 Stat. 612, 645:

> SEC. 15. The consent of the United States is hereby given to the allotment of lands in severality not exceeding one hundred and sixty acres to any one individual within the limits of the country occupied by the Cherokees, Creeks, Choctaws, Chickasaws, and Seminoles; and upon such allotments the individuals to whom the same may be allotted shall be deemed to be in all respects citizens of the United States. * * * and upon the allotment of the lands held by said tribes respectively the reversionary interest of the United States therein shall be relinquished and shall cease.
>
> SEC. 16. The President shall nominate and, by and with the advice and consent of the Senate, shall appoint three commissioners to enter into negotiations with the Cherokee Nation, the Choctaw Nation, the Chickasaw Nation, the Muscogee (or Creek) Nation; the Seminole Nation, for the purpose of the extinguishment of the national or tribal title to any lands within that Territory now held by any and all of such nations or tribes, either by cession of the same or some part thereof to the United States, or by the allotment and division of the same in severalty among the Indians * * * or by such other method as may be agreed upon between the several nations and tribes aforesaid, or each of them, with the United States, * * *

Act of June 28, 1898, c. 517, 30 Stat. 495, 514:

> SEC. 30. That the agreement made by the Commission to the Five Civilized Tribes with the commission representing the Muscogee (or Creek) tribe of Indians on the twenty-seventh day of September, eighteen hundred and ninety-seven, as herein amended, is hereby ratified and confirmed * * *
>
> * * * * * * * * *
>
> 1. There shall be allotted out of the lands owned by the Muscogee or Creek Indians in the Indian Territory

to each citizen of said nation one hundred and sixty acres of land. * * *.

* * * * * * * * * *

5. The United States shall put each allottee in unrestricted possession of his allotment and remove therefrom all persons objectionable to the allottee.

* * * * * * * * * *

34. Neither the town lots nor the allotment of land of any citizen of the Muscogee or Creek Nation shall be subjected to any debt contracted by him prior to the date of his patent.

* * * * * * * * * *

Act of March 1, 1901, c. 676, 31 Stat. 861:

* * * That the agreement negotiated between the Commission to the Five Civilized Tribes and the Muscogee or Creek tribe of Indians at the city of Washington on the eighth day of March, nineteen hundred, as herein amended, is hereby accepted, ratified, and confirmed. * * *

* * * * * * * * * *

3. All lands of said tribe, except as herein provided, shall be allotted among the citizens of the tribe by said commission so as to give each an equal share of the whole in value, as nearly as may be, in manner following: There shall be allotted to each citizen one hundred and sixty acres of land—boundaries to conform to the Government survey—which may be selected by him so as to include improvements which belong to him. * * *

* * * * * * * * * *

7. Lands allotted to citizens hereunder shall not in any manner whatsoever, or at any time, be incumbered, taken, or sold to secure or satisfy any debt or obligation contracted or incurred prior to the date of the deed to the allottee therefor and such lands shall not be alienable by the allottee or his heirs at any time before the expiration of five years from the ratification of this agreement, except with the approval of the Secretary of the Interior.

Each citizen shall select from his allotment forty acres of lands as a homestead, which shall be nontaxable and inalienable and free from any incumbrance whatever for twenty-one years, for which he shall have a separate deed, conditioned as above: * * *

* * * * * * * * * *

23. * * * All conveyances shall be approved by the Secretary of the Interior, which shall serve as a relinquishment to the grantee of all the right, title, and interest of the United States in and to the lands embraced in his deed. * * *

Act of June 30, 1902, c. 1323, 32 Stat. 500, 503:

* * * That the following supplemental agreement, submitted by certain commissioners of the Creek tribe of Indians, as herein amended, is hereby ratified and confirmed: * * *

* * * * * * * * * *

16. Lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior. Each citizen shall select from his allotment forty acres of land, or a quarter of a quarter section, as a homestead, which shall be and remain nontaxable, inalienable, and free from any incumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear.

* * * * * * * * * *

20. This agreement is intended to modify and supplement the agreement ratified by said act of Congress approved March 1, 1901, and shall be held to repeal any provision in that agreement or in any prior agreement, treaty, or law in conflict herewith.

* * * * * * * * * *

Act of April 21, 1904, c. 1402, 33 Stat. 189, 204:

> • • • And all the restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood, except minors, are, except as to homesteads, hereby removed, and all restrictions upon the alienation of all other allottees of said tribes, except minors, and except as to homesteads, may, with the approval of the Secretary of the Interior, be removed • • •
>
> • • • • • • • • • •

Act of April 26, 1906, c. 1876, 34 Stat. 137, 144:

> SEC. 19. That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this Act, unless such restriction shall, prior to the expiration of said period, be removed by Act of Congress; and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior: • • • *Provided further*, That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee.
>
> • • • • • • • • • •
>
> SEC. 22. That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; • • • All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe.
>
> • • • • • • • • • •
>
> SEC. 29. That all Acts and parts of Acts inconsistent with the provisions of this Act, be and the same are hereby repealed.

Act of May 27, 1908, c. 199, 35 Stat. 312:

> • • • That from and after sixty days from the date of this Act the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows: All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood including minors shall be free from all restrictions. All lands, except homesteads, of said allottees enrolled as mixed-blood Indians having half or more than half and less than three-quarters Indian blood shall be free from all restrictions. All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood, including minors of such degrees of blood, and all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. The Secretary of the Interior shall not be prohibited by this Act from continuing to remove restrictions as heretofore, and nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this Act. • • •
>
> • • • • • • • • • •
>
> SEC. 4. That all lands from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes: *Provided*, That allotted lands shall not be subjected or held liable, to any form of personal claim, or demand, against the allottees arising or existing prior to the removal of restrictions, other than contracts theretofore expressly permitted by law.

SEC. 9. That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided*, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee: * * *

Act of May 25, 1918, c. 86, 40 Stat. 561, 592:

SEC. 28. * * * *And provided further*, That the foregoing shall not apply to the funds of the Five Civilized Tribes, or the Osage Tribe of Indians, in the State of Oklahoma, but the funds of such tribes and individual members thereof shall be deposited in the banks of Oklahoma or in the United States Treasury and may be secured by the deposit of United States bonds.

Act of April 12, 1926, c. 115, 44 Stat. 239, amending section 9 of the Act of May 27, 1908, to read as follows:

SEC. 9. The death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided*, That hereafter no conveyance by any full-blood Indian of the Five Civilized Tribes of any interest in lands restricted by section 1 of this Act acquired by inheritance or devise from an allottee of such lands shall be valid unless approved by the county court having jurisdiction of the settlement of the estate of the deceased allottee or testator; * * *

Act of May 10, 1928, c. 517, 45 Stat. 495:

* * * That the restrictions against the alienation, lease, mortgage, or other incumbrance of the lands allotted to members of the Five Civilized Tribes in Oklahoma, enrolled as of one-half or more Indian blood, be, and they are hereby extended for an additional period of twenty-five years commencing on April 26, 1931: *Provided*, That the Secretary of the Interior shall have the authority to remove the restrictions, upon the applications of the Indian owners of the land, and may

remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe.

* * * * * * * * *

SEC. 3. That all minerals, including oil and gas, produced on or after April 26, 1931, from restricted allotted lands of members of the Five Civilized Tribes in Oklahoma, or from inherited restricted lands of full blood Indian heirs or devisees of such lands, shall be subject to all State and Federal taxes of every kind and character the same as those produced from lands owned by other citizens of the State of Oklahoma; and the Secretary of the Interior is hereby authorized and directed to cause to be paid, from the individual Indian funds held under his supervision and control and belonging to the Indian owners of the land, the tax or taxes so assessed against the royalty interest of the respective Indian owners in such oil, gas, and other mineral production.

* * * * * * * * *

Act of January 27, 1933, c. 23, 47 Stat. 777:

* * * That all funds and other securities now held by or which may hereafter come under the supervision of the Secretary of the Interior, belonging to and only so long as belonging to Indians of the Five Civilized Tribes in Oklahoma of one-half or more Indian blood, enrolled or unenrolled, are hereby declared to be restricted and shall remain subject to the jurisdiction of the said Secretary until April 26, 1956, subject to expenditures in the meantime for the use and benefit of the individual Indians to whom such funds and securities belong, * * * *And provided further,* That all minerals including oil and gas, produced from said land so acquired shall be subject to all State and Federal taxes as provided in section 3 of the Act approved May 10, 1928 (45 Stat. L. 495).

* * * * * * * * *

INDEX.

CITATIONS.

Cases: Page

Blackbird v. Commissioner, 38 F. (2d) 976, reversing 14 B. T. A. 1247 9
Carpenter v. Shaw, 280 U. S. 363 7
Colgate-Palmolive-Peet Co. v. United States, 58 F. (2d) 499 10
Leisering et al. v. United States, 3 Fed. Supp. 853.. 10
Tiger v. Western Investment Co., 221 U. S. 286.... 6
United States v. Brown, 8 F. (2d) 564, certiorari denied 270 U. S. 644 7
United States v. Richards, 27 F. (2d) 284, certiorari denied 278 U. S. 630 ..... 8, 10

Statutes:

Act of March 1, 1901, 31 Stat. 861 3
Act of June 30, 1902, 32 Stat. 500 3
Act of April 21, 1904, 33 Stat. 189 2
Act of April 26, 1906, 34 Stat. 137 ..... 2, 3, 4, 5, 6, 8
Act of May 27, 1908, 35 Stat. 312..... 7, 8
Act of May 10, 1928, 45 Stat. 495 6
Judicial Code, sec. 156, 36 Stat. 1139 10
Revenue Act of 1928, c. 852, 45 Stat. 791, sec. 507.. 8

Miscellaneous:

34 Ops. A. G. 275..... 2, 9
34 Ops. A. G. 302 9
35 Ops. A. G. 107 9
S. J. 163, 71st Cong. 10
S. J. 167, 72nd Cong. 1st Sess. 10, 11
Sen. Report, No. 982, 70th Cong. 1st Sess. 6
S. M. 4527, Cumulative Bulletin IV-2, p. 29 9
S. M. 5632, Cumulative Bulletin V-1, p. 193..... 11
Treasury Decision 3750, Cumulative Bulletin, III-1, p. 85 ..... 2, 9
Treasury Decision 3754, Cumulative Bulletin IV-2, p. 37 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

817.

SUPERINTENDENT FIVE CIVILIZED TRIBES, FOR SANDY FOX, CREEK NO. 1263, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONER.

It is the position of the Respondent that exemption from Federal income taxes can only exist in this case by virtue of an agreement creating a vested right of non-taxability. Such a right he insists is present here only insofar as Sandy Fox's homestead is concerned, qualified to the extent that it is doubtful if this right would extend to the income produced from the homestead. (Br. 12, 13.) This position is

predicated on the language embodied in the Original and Supplemental Creek Agreements, which agreements, for purposes of Federal taxation, were reviewed by the Attorney General in 34 Ops. A. G. 275, published as Treasury Decision 3750 (cumulative Bulletin III-1, p. 85). This opinion of the Attorney General also considered the Act of April 26, 1906, 34 Stat. 137. Footnote No. 7 (Resp. Br. p. 26) states:

> "We think the Treasury has made too much of the Act of [April 26,] 1906."

The agreements with the Cherokees, the Choctaws, the Chickasaws, the Creeks and the Seminoles show a lack of uniformity in the various documents. The Atoka agreement with the Choctaws and Chickasaws provided in part that all allotted lands should be non-taxable so long as the title remained in the original allottee but not to exceed twenty-one years from date of patent. The Original and Supplemental Creek Agreements provided that the 40 acre homestead alone should be non-taxable for twenty-one years from deed of patent. These promises of non-taxability are indicative of the attitude and policy of Congress towards its wards.

However the real interest of Congress was not the tribe to which the particular allottee belonged, but his quantum of Indian blood. This is evident from the Act of April 21, 1904, 33 Stat. 189, 204, whereby restrictions, on the property of the various allottees of the Five Civilized Tribes who were not of Indian blood, were removed. In 1906, or shortly thereafter, restrictions on most of the lands of the allottees of the Five Civilized Tribes were about to expire by limitation. With this in mind Congress enacted the Act of April 26, 1906, c. 1876, 34 Stat. 137, which provides in its caption:

> "An Act To Provide For The Final Disposition Of The Affairs Of The Five Civilized Tribes In The Indian Territory, And For Other Purposes."

This Act deals with the tribes as a group. By section 19 thereof, Congress retained restrictions as to alienation on the allotments of all full-blood Indians of these various tribes and further provided:

> "That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee."

Respecting the Act of April 26, 1906, the Respondent contends that it is merely an Act of Congress and not an agreement. The Original and Supplemental Creek Agreements were also Acts of Congress, Act of March 1, 1901, 31 Stat. 861, and Act of June 30, 1902, 32 Stat. 500, respectively. Although the Act of April 26, 1906, unlike the earlier Acts, did not provide for ratification by the tribes, it was in fact ratified and approved by the Creek Tribe of which Sandy Fox is a full-blood member. This ratification does not appear in the transcript of record, nor was it presented at the trial of the case below. We embody a copy of it here for any purpose it may be competent to serve:

> "Resolved by the National Council of the Muskogee (Creek) Nation, in extra session assembled; that Section nineteen (19) of the Act of Congress of the United States approved April 26th, 1906, (Public No. 129), which reads as follows:
>
> 'That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this Act, unless such restrictions shall, prior to the expiration of said period be removed by Act of Congress; and for all purposes the quantum of Indian blood possessed by any member of said tribe shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior; Provided, however, That such full-blood Indians of any of said tribes may lease any lands other than homesteads for

more than one year under such rules and regulations as may be prescribed by the Secretary of the Interior; and in case of the inability of any full-blood owner of a homestead, on account of infirmity or age, to work or farm his homestead, the Secretary of the Interior, upon proof of such inability, may authorize the leasing of such homestead under such rules and regulations: Provided further, That conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to the selection of allotment and subsequent to removal of restrictions, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed; but this shall not be held or construed as affecting the validify orinvalidity of any such conveyance, except as hereinabove provided; and every deed executed before the removal of restrictions, be and the same is hereby declared void; Provided further, That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee.'

is hereby ratified, confirmed and approved.

"Be it further resolved that Section twenty-two (22) of the Act of Congress of the United States, approved April 26th, 1906, (Public No. 129) which reads as follows:

'That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States Court for the Indian Territory. And in case of the organization of a state or territory, then by a proper Court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of

such Court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe.'

is hereby adopted, ratified and confirmed.

"Be it further resolved that Section twenty-three (23) of the Act of Congress of the United States, approved April 26th, 1906, (Public No. 129), which reads as follows:

'Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: Provided, That no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a Judge of the United States Court for the Indian Territory, or a United States Commissioner.'

August 2nd, 1907.

DAVID ANDERSON,
Pres. House of Kings, Pro Tem.

SAM. GRAYSON,
Clerk.

Concurred in August 2nd, 1907.

ALEX DAVIS,
Speaker House of Warriors.

MILDRED CHILDERS,
Clerk.

Approved August 3rd, 1907.

P. PORTER,
Principal Chief.

THE WHITE HOUSE,

Washington, September 17, 1907.

APPROVED:

T. ROOSEVELT.

I hereby certify that I am the officer having custody of the records pertaining to the Acts and Resolutions passed by the National Council of the Creek Nation and that the above and foregoing is a true and correct copy of a Resolution passed by said Council August 2, 1907, approved by the Principal Chief of the Creek Nation August 3, 1907, and by the President September 17, 1907, ratifying and confirming Sections 19, 22 and 23 of the Act of Congress approved April 26, 1906.

THOS. RYAN,
Acting Commissioner to the Five Civilized Tribes.

Muskogee, Okla., Feb. 28, 1910."

The above resolution was copied from the records of this Court in case No. 60, October Term 1910, *Tiger* v. *Western Investment Co.*, and appears at page 70 of Brief of Plaintiff in Error filed in that case on March 12, 1910. At page 310 of 221 U. S., this Court in deciding *Tiger* v. *Western Investment Co.* referred to this ratification as follows:

"• • • it is stated without contradiction that the Act of 1906 has been ratified by the council of that [Creek] Nation."

Thus the Creek Tribe of Indians, at least, considered the Act of April 26, 1906, as a further agreement as evidenced by their ratification. That the Federal Government considered this Act as an agreement is evidenced by Senate Report No. 982, 70th Cong. 1st Sess., accompanying the Act of May 10, 1928, 45 Stat. 495. This report embodies a letter from the Secretary of the Interior which reviews the agreements with the Five Tribes including the Act of April 26, 1906, and states (p. 2):

"• • • These *agreements*, set forth in the above-mentioned acts of Congress • • • also contained provisions relating to the nontaxability, for certain periods of time, of the allotments or parts of allotments." (Italics supplied)

We further feel that the exemption from taxation embodied in section 19 of this Act was supported by a consideration, if any was needed. As to the full-blood Creek Indians, restrictions on alienation of their surplus lands would expire by lapse of time in 1907, and Congress in retaining control of their affairs until April 26, 1931, gave to them an exemption from taxation as long as the title to their allotments remained in the original allottees.

The Respondent contends (Br. 13):

> "They made no agreement respecting the government's right later to levy an income tax."

This contention, it is submitted was rejected in principle by this Court in the recent case of *Carpenter* v. *Shaw*, 280 U. S. 363. In that case restrictions had been removed by the Act of May 27, 1908, 35 Stat. 312, from the allotments of Choctaw Indians. These allotments had been leased for the production of oil and gas with a reserved royalty to the Indian and the State of Oklahoma asserted a tax upon this royalty interest to the extent of 3 per cent of its value. This Court in denying the tax stated (p. 367):

> "* * * we think the provisions that 'the lands allotted shall be non-taxable while the title remains in the allottees' cannot be taken to be restricted only to those taxes commonly known as land or real estate taxes, but must be deemed at least to embrace a tax assessed against the allottees with respect to a legal interest in their allotment less than the whole."

Respondent also states (Br. 26):

> "The source of the income here is not the taxpayer's original allotted lands."

In *United States* v. *Brown*, 8 F. (2d) 564, certiorari denied 270 U. S. 644, and in the numerous cases reviewed therein, it is well recognized and established that the income from an allotment is merely a change in form; that this income is in fact a part of the allotment, and that the same

conditions exist respecting it as exists with the allotted lands.

In summation the conclusion to be drawn from the Original and Supplemental Creek Agreements together with the Act of April 26, 1906, *supra*, is that the income here in question is either in fact or by liberal construction of the Acts of Congress income from this full-blood Indian's allotment and that by the Act of April 26, 1906, it is exempted from taxation. A holding by this Court to this effect would be sufficient for the purposes of this case, for the refund sought herein is protected, even under the provisions of the Revenue Act of 1928, sec. 507, 45 Stat. 791, amending sec. 284 (c) of the Revenue Act of 1926, by the filing of the petition before the Board of Tax Appeals.

But petitioner's position that his income is non taxable is founded on a broader principle than that of a vested right of tax exemption. Such a vested right may exist as to certain income, but if in fact this income is reported for purposes of Federal taxation, the tax paid thereon will not be refunded until a condition precedent has been complied with, namely, the filing of a proper claim for refund within the applicable statutory period. This rule has been applied to members of the Choctaw Tribe of Indians to whom a vested right of tax exemption exists by virtue of the Atoka Agreement. *United States* v. *Richards*, (C. C. A. 8) 27 F. (2d) 284, certiorari denied 278 U. S. 630. There it was conceded that Federal income taxes had been erroneously and illegally assessed and collected on royalties paid to him on oil produced from lands allotted to him. Restrictions had been removed from his lands by the Act of May 27, 1908, *supra*, and the Court stated at page 286 of 27 F. (2d):

> "At the times the assessments and payments were made he had full charge and control of the allotment and the income therefrom. * * * He was charged with notice that there was a special and exclusive remedy provided for the recovery of a tax that had been erroneously and illegally assessed and collected. He attempted to avail himself of that remedy without com-

plying with precedent conditions on which it rested.

> On the facts set up we think plaintiff's claim cannot be granted as of legal right."

As to Restricted Indians, however, this rule of construction is inapplicable. They are not amenable to the Federal income statutes, and such is the holding of the Attorney General, the Treasury Department, and the courts. 34 Ops. A. G. 302, Treasury Decision 3754, Cumulative Bulletin IV-2, p. 37, *Blackbird* v. *Commissioner*, 38 F. (2d) 976, reversing 14 B. T. A. 1247. And none of these decisions are predicated upon any agreement granting a vested right of tax exemption. To the contrary no such agreement existed between the Federal Government and the Restricted Quapaw Indians, Treasury Decision 3754, *supra*; or between the Federal Government and the Restricted Osage Indians, *Blackbird* v. *Commissioner*, *supra*. In 35 Ops. A. G. 107, 108, the Attorney General held that the Federal income tax laws did not apply to the income of a full-blood, unallotted, Hopi Indian. The income there under consideration arose partly from the increase of sheep and cattle, partly from a trading post conducted by the Indian, and partly from a stage line for conducting tourists over the Hopi Reservation. This opinion of the Attorney General is on all fours and is in direct conflict with S. M. 4527, Cumulative Bulletin IV-2, p. 29, relied upon by the Respondent (Br. 24) to support the views of the Treasury Department since 1925. It will be noted that S. M. 4527 and the other rulings relied upon by Respondent in his brief are rulings of the Bureau of Internal Revenue and *not* Treasury Decisions. The only Treasury Decisions in point are T. D. 3750, *supra*, and T. D. 3754, *supra*, and they both support the position of petitioner here. Any doubt that may have existed as to the effect of 34 Ops. A. G. 275, published as T. D. 3750 was removed by the further opinion of the Attorney General in 34 Ops. A. G. 302. It was there stated (p. 305):

> "Moreover, inasmuch as *the income tax statutes do not apply to the class of Indians under discussion*, I see no reason why the limitations clauses therein contained relative to claims for refund or abatements should be invoked against them." (Italics supplied)

The Respondent takes the further position (Br. 27) that the income here in question is taxable by implied Congressional approval of his position here, and in support thereof, he cites S. J. Res. 167, passed February 14, 1933 (No. 53, 72nd Cong. 1st Sess.). The purpose of this resolution (Senate Report No. 830, 72nd Cong. 1st Sess.) was to give to unrestricted Indians a year from the passage of the Act in which to file claims for refund for interest where interest was not included in the prior claim for refund of taxes. The resolution granted relief as to interest to those unrestricted Indians affected by the ruling in *United States* v. *Richards*, 27 F. (2d) 284. Congress had previously granted a year in which to file claims for refund for the taxes erroneously paid, but barred from recovery under the rule laid down in *United States* v. *Richards*, *supra*. Public Resolution No. 74, 71st Cong. (S. J. 163), approved May 19, 1930, *infra* p. 12.

S. J. Res. 167 obviously refers to refunds made more than six years prior to February 14, 1933, for interest on any refunds subsequent to February 14, 1927, would have been protected without further legislation from Congress. *Colgate-Palmolive-Peet Co.* v. *United States*, 58 F. (2d) 499, *Leisering et al.* v. *United States*, 3 Fed. Supp. 853. The six-year limitation for filing suit to recover interest is provided for in Section 156 of the Judicial Code (36 Stat. 1139), which provides in part:

> "Every claim against the United States cognizable by the Court of Claims, shall be forever barred unless the petition setting forth a statement thereof is filed in the court, or transmitted to it by the Secretary of the Senate or the Clerk of the House of Representatives, as provided by law, within six years after the claim first accrues."

Further there is no limitation for filing refund claims by Indians with Petitioner's status, and such is the ruling in S. M. 5632, Cumulative Bulletin V-I, pages 193, 198, as follows:

> "* * * the only tax which may be refunded without reference to the various statutes of limitations is (1) a tax which was assessed against the non-taxable income of an Indian and (2) which has been paid by an Indian superintendent, or other such officer of the United States, out of funds in his possession belonging eventually to his ward."

Thus the only logical inference to be drawn from S. J. Res. 167 is that Congress was granting a year in which to file a claim for refund to those Indians who received refunds prior to February 14, 1927, and whose status required the filing of a refund claim.

It seems to us to be improbable and inconsistent to construe a Joint Resolution of Congress, the purpose of which is admittedly that of relief to Unrestricted Indians, as a declaration by Congress of its approbation of a tax asserted against its Restricted wards upon a highly technical basis. To the contrary we feel that Congress in enacting identical language in subsequent Revenue laws was content with the construction placed upon such language by the Attorney General, by the Treasury Department in its Treasury Decisions, and by the courts. These decisions hold that the Federal Revenue Laws are inapplicable to the Indian wards of the Government with the status of Sandy Fox.

Accordingly the decision below should be reversed.

Respectfully submitted,

THOMAS J. REILLY,
F. M. GOODWIN,
ARTHUR F. MULLEN,
GEORGE F. SHEA,
Attorneys for Petitioner.

May 4, 1935.

APPENDIX

Public Resolution No. 74, 71st Cong. (S. J. 163), approved May 19, 1930:

Resolved by the Senate and House of Representatives of the United States of America in Congress Assembled, That any person duly enrolled as a member of an Indian tribe who received in pursuance of a tribal treaty or agreement with the United States an allotment of land which by the terms of said treaty or agreement was exempted from taxation, and from which land the restrictions have been removed, and who was required or permitted contrary to such stipulation to pay any illegal or unauthorized Federal tax on the rents, royalties, or other gains arising from such tax-exempt lands during the period of such exemption and who would be entitled under the law and rulings of the Treasury Department in similar Indian cases to a refund of the taxes so illegally or erroneously collected but for the fact that he failed to file a claim for such refund within the time prescribed by law, shall be allowed one year after the approval of this Act within which to file such claim, and if otherwise entitled thereto he may recover such illegal taxes in the same manner and to the same extent as if such claims for refund had been theretofore duly filed as required by law, it not being the policy of the Government to invoke or plead a statute of limitations to escape the obligations of agreements solemnly entered into with its Indian wards: Provided, however, That in the case of the death of any such person any such illegal taxes paid by him or on his account may in like manner be claimed and recovered by the person or persons who would have received such money had it constituted a part of his estate at the time of his death.

INDEX.

	Page
Court Decisions	2
Opinions of the Attorney General	3
Treasury Decisions	3
Construction of Income Tax Laws Applicable Here	4
Secretary of the Interior	4
Contemporaneous Construction by Executive Officers	6
Conclusion	8

CITATIONS.

CASES:

Blackbird v. Commissioner, 38 F. (2d) 976, reversing 14 B. T. A. 1247	2, 6, 8
Helvering v. New York Trust Co., 292 U. S. 455	7-8
Pitman v. Commissioner, 64 F. (2d) 740	2, 3
State of Wisconsin v. State of Illinois, 278 U. S. 367	7
Tiger v. Western Investment Co., 231 U. S. 286	8
United States v. Homeratha, 40 F. (2d) 305, appeal dismissed by stipulation, 49 F. (2d) 1086	2
United States v. Jackson, 280 U. S. 183	6-7
United States v. Johnston, 124 U. S. 235	7

MISCELLANEOUS:

34 Ops. A. G. 275	3-4
34 Ops. A. G. 302	3, 5
34 Ops. A. G. 439	3, 5
35 Ops. A. G. 1	3, 5
35 Ops. A. G. 107	3, 5
Treasury Decision 3750, Cumulative Bulletin III-1, p. 85	3
Treasury Decision 3754, Cumulative Bulletin IV-2, p. 37	3
51 Land Decision, 326	6
Memorandum for Respondent supporting Petition for Certiorari	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

817.

SUPERINTENDENT FIVE CIVILIZED TRIBES, FOR SANDY FOX, CREEK NO. 1263, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

MEMORANDUM FOR PETITIONER.

Supplementing what has been said in the briefs and oral arguments of the Petitioner, the following is added: In the instant case, a divided Court (C. C. A. 10), held that Petitioner is subject to an income tax on income derived from his restricted property.

In opposition to the majority opinion, there is vigorous dissent by the senior member of the Court. This dissent is supported by many opinions of the Attorney General;

by Treasury Decisions of the Treasury Department; by the contemporaneous and long continued practical construction of the Revenue Laws of the United States by its executive officers charged with the administration of the Affairs of Indians, and by repeated decisions of the Federal Courts.

Among these are *Blackbird* v. *Commissioner*, 38 F. (2d) 976 (C. C. A. 10); *United States* v. *Homeratha*, 40 F. (2d) 305, appeal dismissed by stipulation, 49 F. (2d) 1086; and *Pitman* v. *Commissioner*, 64 F. (2d) 740.

Court Decisions.

It is significant that the Respondent's brief does not cite, discuss or attempt to distinguish the important case of *Blackbird* v. *Commissioner, supra.*

This omission is particularly significant in view of Respondent's statement in the memorandum which he filed when joining with the Petitioner for a Writ of Certiorari. On page 2 of that memorandum, the following appears:

> "The question is whether such income is subject to Federal income tax. The Circuit Court of Appeals, by a divided Court, held that it was, and in so doing in effect overruled its earlier decision in *Blackbird* v. *Commissioner*, 38 F. (2d) 976."

The *Blackbird* case was unanimously decided in 1930. In 38 F. (2d) at page 978, the Court said:

> "She and the other petitioners contend that they are not only not liable for the amounts named under the deficiency orders but that they are not subject to the income tax statute. As to Mary Blackbird, we are disposed to yield our assent to the soundness of the contention. She is a restricted full-blood Osage. Her property is under the supervising control of the United States. She is its ward, and we cannot agree that because the income statute, Act of 1918 (40 Stat. 1057), and Act of 1921 (42 Stat. 227), subjects 'the net income of every individual' to the tax, this is alone sufficient to make the Acts applicable to her."

In *Pitman* v. *Commissioner*, 64 F. (2d) 740 (C. C. A. 10), the Court made it clear that the income derived from *restricted property* of a restricted Indian was not subject to income tax and reversed the Board of Tax Appeals, because that Board upheld a levy of income taxes on the income derived from restricted property of a restricted Indian.

In the same opinion the Court made it clear that the income derived from *unrestricted* property of a restricted Indian was subject to an income tax.

Nowhere has any court held that the United States has levied an income tax on the income derived from the *restricted property* of a *restricted Indian.*

Opinions of the Attorney General.

In a number of opinions, the Attorney General has held that the Federal Income Tax laws of the United States do not apply to Indians with a status similar to Petitioner.

See:

34 Ops. A. G. 275 (March 15, 1924).
34 Ops. A. G. 302 (August 14, 1924).
34 Ops. A. G. 439 (March 20, 1925).
35 Ops. A. G. 1 (November 11, 1925).
35 Ops. A. G. 107 (June 24, 1926).

Treasury Decisions.

The Treasury Department has on two different occasions issued two Treasury Decisions, which have held that no income tax has been imposed on the income derived from the restricted property of restricted Indians.

See:

T. D. 3750, Cumulative Bulletin III—1 Page 85.
T. D. 3754, Cumulative Bulletin IV—2 Page 37.

The foregoing opinions embodied in toto the opinions given by the Attorney General, namely:

34 Ops. A. G. 275.
34 Ops. A. G. 439, respectively.

Construction of Income Tax Laws Applicable Here.

The income tax amendment became effective March 1, 1913. Shortly thereafter, a comprehensive income tax law was passed by Congress. For the past 22 years, Congress has repeatedly either enacted or modified the Federal income tax laws.

From the beginning, the various income tax laws have provided that they applied to all individuals and to all income, whatever the source. Notwithstanding this broad language, the various executive departments have held that income tax laws did not apply to the income of restricted Indians derived from restricted property. This interpretation has been uniformly upheld by the Federal Courts, whenever the question has been presented to them.

The familiar rule of statutory construction which properly places great weight on the construction given to the statute by the various executive departments, charged with the interpretation and administration is applicable. This is particularly true, where, as here, the authorities have held against the levying of taxes.

Secretary of the Interior.

In the beginning, the Bureau of Internal Revenue held that the income of the Indian wards of the Government were subject to Federal income taxes. These rulings were questioned by the Secretary of the Interior and an opinion of the Attorney General was requested. In response to this request, the Attorney General ruled that the income tax laws did not apply to the members of the Five Civilized Tribes of which Petitioner is a full-blood member, 34 Ops. A. G. 275.

However, this opinion of the Attorney General did not consider the feature as to whether or not claims for refund were on file to protect the Indians' rights. Accordingly, a further opinion was requested of the Attorney General in respect of this feature.

In response to this question the Attorney General ruled that as to the class (of which Petitioner is a member) the Federal income tax laws were not applicable and accordingly all taxes were refunded whether or not claims for refunds were filed. 34 Ops. A. G. 302.

As to the Indians considered in the foregoing opinions of the Attorney General, there were provisions in the various allotment acts, relative to inalienability and nontaxability. But as to Quapaw Indians, the word "nontaxability" was not used. The allotment act merely provided for inalienability.

The question presented to the Attorney General was whether, under this situation, the Revenue laws were applicable to the income derived from the property of the Quapaw Indians.

In answering this question in the negative the Attorney General said that *inalienability* and *nontaxability* should go hand in hand and that it should not lightly be assumed that Congress intended to tax the ward for the benefit of the guardian. 34 Ops. A. G. 439.

In 35 Ops. A. G. 1, the Attorney General was called upon to construe for purposes of federal taxation the effect of an act of Congress, permitting Oklahoma to levy a State income tax upon the income of a restricted Kaw Indian. The Attorney General held: the fact that he was a restricted Kaw Indian governed, and the fact that Oklahoma was permitted to tax the income was not a sufficient declaration of Congress to permit the imposition of a federal income tax.

In 35 Ops. A. G. 107, the income sought to be taxed was derived partly from the increase in sheep and cattle; partly from a trading post, and partly from a stage line, conducted for carrying tourists through the Hopi Reservation. The Indian there under consideration was restricted but was unallotted. The Attorney General held that the broad language of the Federal income tax law was not sufficient to subject his income to a Federal tax. This opinion of the

Attorney General affirmed an earlier decision of the Interior Department reported at 51 Land Decisions 326 (Jan. 20, 1926).

Thus, although income tax returns were originally required of Indians of Petitioner's status, by executive construction, all such taxes have been authorized for refund.

It is interesting to note that as late as 1929, a refund was made to Petitioner under authority of Treasury Decision 3750, for the years, 1914, 1915 and 1916 (Tr. p. 12). It is the interest on those refunds which is the basis of the deficiency involved herein.

These executive rulings, however, were not applied to the income of restricted Osage Indians and it became necessary to litigate this matter before the Board of Tax Appeals and the Circuit Court of Appeals for the Tenth Circuit.

The case selected as the test case was *Mary Blackbird* v. *Commissioner, supra.* The Board of Tax Appeal held that Blackbird was liable for the tax and on appeal to the Circuit Court of Appeals, Tenth Circuit, this ruling was reversed. The Court held that no income tax could be imposed on the income of a restricted Osage Indian.

The Department of Justice acquiesced in that opinion and no one in its behalf made application to this Court for certiorari.

As a result of the Blackbird decision, all income taxes levied upon and paid by the restricted Osage Indians, have been refunded by the Treasury Department. In addition to this, all cases involving the income taxes of the restricted Osage Indians were dismissed before the Board of Tax Appeals with the order of "No deficiency," and the further order authorizing the refund of all taxes theretofore paid.

Contemporaneous Construction by Executive Officers.

In the recent case of *United States* v. *Jackson,* 280 U. S. 183, this Court announced the familiar and long established rule that (p. 193):

> "• • • such construction [contemporaneous executive construction] is not to be overturned unless clearly wrong, or unless a different construction is plainly required."

Again in *State of Wisconsin* v. *State of Illinois*, 278 U. S. 367, this Court, in discussing the construction given to a statute by the War Department said, on page 413:

> "Nothing is more convincing in its interpretation of a doubtful or ambiguous statute."

Again in *U. S.* v. *Johnston*, 124 U. S. 235, on page 253, Mr. Justice Harlan, speaking for the Court, said:

> "In view of the foregoing facts the case comes fairly within the rule often announced by this court, that the contemporaneous construction of a statute by those charged with its execution, especially when it has long prevailed, is entitled to great weight, and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous."

In the instant case it is admitted that the Respondent is a restricted Indian and that the property sought to be taxed is restricted property. The question clearly presented is a narrow one, to wit: Did Congress intend to levy an income tax for the year 1929, on the income derived from the restricted property of the Petitioner?

A careful and thorough examination of the various agreements, laws, treaties, executive orders and court decisions, does not disclose a single authority to sustain the claim of the Respondent in the instant case.

The Respondent in attempting to sustain his position cites on page 24 of his Brief, a number of rulings and decisions of various minor officers in the office of the Commissioner of Internal Revenue.

The rule announced by this Court in *Helvering* v. *New*

York Trust Company, 292 U. S. 455, makes the value of these rulings negligible. This Court stated (p. 468):

> "The rulings, I. T. 1379, 1660 and 1889, cited by the Commissioner were made before the passage of the 1924 Act but they 'have none of the force or effect of Treasury decisions and do not commit the Department to any interpretation of the law.' See cautionary notice published in the Bulletins containing these rulings. It does not appear that the attention of Congress had been called to any such construction. There is no ground on which to infer that by the 1924 Act Congress intended to approve it."

Conclusion.

Over 100 years ago the Creek Indians were taken from their home East of the Mississippi and placed on the bleak and desolate plains of what was then the Indian territory.

Our Government took control of the property of these Indians and administered that property under its direction and control. It made this tribe its wards. The nation made itself the guardian of the Creek Indians.

It was decided many years ago in *Tiger* v. *Western Investment Company*, 231 U. S. 286, that the question of what restrictions should be placed on the Indians and when these restrictions should be removed, was a question under the control of Congress. It has been decided that this power is exclusively under Congress and that the Courts have no jurisdiction over Congress in the matter of exercising this power.

It is insisted that the affirmance of the instant case overrules *Blackbird* v. *Commissioner, supra*. It is plain that the Respondent in the instant case intends, if permitted by this Court, to levy and collect income taxes on all the income derived from the restricted property of all the restricted Indians in our country.

The right to levy taxes against any person should not be doubtful. The intent to levy income taxes against the re-

stricted income of the Petitioner should be plain and definite. The present policy of the United States is not to levy income taxes on the income derived from the restricted property of its restricted wards. If the present plan is to be changed and a new policy adopted, it is for Congress alone to so state in plain and unambiguous terms.

This radical departure from the policy of Congress should not be inferred nor should it be based on communications addressed by one person to another inside the Bureau of Internal Revenue.

The Court below erred in this case. Its judgment should be reversed.

Respectfully submitted,

THOMAS J. REILLY,
F. M. GOODWIN,
ARTHUR F. MULLEN,
GEORGE F. SHEA,
Attorneys for Petitioner.

May 9, 1935.

In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 817

SUPERINTENDENT FIVE CIVILIZED TRIBES, FOR SANDY FOX, CREEK NO. 1263, petitioner

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

We do not oppose the granting of a writ of certiorari in this case.

The petitioner is a full-blood, restricted Creek Indian, a ward of the Federal Government. His properties are held in trust and invested for him by the Superintendent of Five Civilized Tribes under the direction of the Secretary of the Interior. The income from such investments is likewise received and held by the Superintendent in trust for the Indian. During the taxable year the Superintendent accumulated for the benefit of the Indian certain income which was derived from sources

other than the Indian's homestead allotment. The Indian is restricted as to the use of such income. The question is whether such income is subject to Federal income tax. The Circuit Court of Appeals, by a divided court, held that it was, and in so doing in effect overruled its earlier decision in *Blackbird* v. *Commissioner,* 38 F. (2d) 976.

While we think the conclusion reached by the court below is right, we do not feel warranted in opposing the petition for a writ of certiorari. The question presented is one of general public importance. There are a large number of cases now pending involving the question. The question is one of present importance and is likely to arise in many future cases. The final decision in this case will affect not only members of the Five Civilized Tribes, but many restricted Indians of other tribes. While an accurate estimate is not available, the aggregate annual income of the Indians affected is considerable.

Those affected by the decision are wards of the Federal Government, and as such are entitled to every protection. Apparently for this reason this Court has been disposed to review cases involving the rights of Indian wards, even though no conflict has been shown. In *Choteau* v. *Burnet,* 283 U. S. 691, certiorari was granted, despite the fact that there was no conflict. There is no conflict here, nor is any likely to arise, since most of the Indians affected are inhabitants of the Tenth Circuit and their appeals would normally be reviewed by the

court below. In order that these wards of the Government may receive every protection, and in order that the question of the proper procedure to be adopted in cases of this character may be put at rest, we feel that a review by this Court is justified.

Respectfully submitted.

STANLEY REED,
Solicitor General.

APRIL 1935.

U. S. GOVERNMENT PRINTING OFFICE: 1935

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question	2
Statutes and regulations involved	2
Statement	2
Summary of argument	4
Argument	5
Conclusion	32
Appendix	33

CITATIONS

Cases:

Bagby v. *United States*, 69 F. (2d) 80	16, 22
Brader v. *James*, 246 U. S. 88	21
Brunt v. *Commissioner*, 5 B. T. A. 134	7
Carpenter v. *Shaw*, 280 U. S. 363	8, 11, 12
Cherokee Nation v. *Hitchcock*, 187 U. S. 294	8
Childers v. *Beaver*, 270 U. S. 555	17
Choate v. *Trapp*, 224 U. S. 665	8, 11, 12, 13, 15, 16, 24
Choctaw Lumber Co. v. *Coleman*, 56 Okla. 377	12
Choteau v. *Burnet*, 283 U. S. 691	6, 17, 21, 23
Chupco v. *Chapman*, 76 Okla. 201, 170 Pac. 259, certiorari denied, 247 U. S. 506	26
Coleman v. *Davis*, 72 Okla. 248, 180 Pac. 381	26
Crosbie v. *Partridge*, 85 Okla. 186	12
English v. *Richardson*, 224 U. S. 680	8, 12, 25
Ex parte Crow Dog, 109 U. S. 556	7
Farris v. *Union Cent. Life Ins. Co.*, 72 Okla. 220, 179 Pac. 919	17
Fink v. *County Commissioners*, 248 U. S. 399	8, 26
Gillespie v. *Oklahoma*, 257 U. S. 501	17
Goudy v. *Meath*, 203 U. S. 146	7, 20
Heckman v. *United States*, 224 U. S. 413	8, 21
Heiner v. *Colonial Trust Co.*, 275 U. S. 232	6, 7, 17, 23
Helvering v. *Stockholms &c. Bank*, 293 U. S. 84	6, 17
Irwin v. *Gavit*, 268 U. S. 161	6
Jones v. *Meehan*, 175 U. S. 1	17
McCurdy v. *United States*, 246 U. S. 263	20, 21
Parker v. *Richard*, 250 U. S. 235	8, 18
Parker v. *Riley*, 250 U. S. 66	18

Cases—Continued. Page

People v. *Wendell*, 188 N. Y. S. 344, affirmed, 231 N. Y. 620 13
Pitman v. *Commissioner*, 64 F. (2d) 740 16
Pollock v. *Farmers' Loan & Trust Co.*, 158 U. S. 601 13, 28
Rentie v. *Commissioner*, 21 B. T. A. 1230 14
Shaw v. *Oil Corp.*, 276 U. S. 575 8, 15, 16, 19, 21, 22
Silver v. *Silver*, 280 U. S. 117 15
Snell v. *Commissioner*, 10 B. T. A. 1081 27
Sunderland v. *United States*, 266 U. S. 226 8, 12
The Cherokee Tobacco, 11 Wall. 616 7
The Kansas Indians, 5 Wall. 737 17
Tiger v. *Western Investment Co.*, 221 U. S. 286 8, 10, 20, 21, 22
United States v. *Bartlett*, 235 U. S. 72 8
United States v. *Brown*, 8 F. (2d) 564, certiorari denied, 270 U. S. 644 20
United States v. *Gray*, 284 Fed. 103 20
United States v. *Mummert*, 15 F. (2d) 926 20
United States v. *Nice*, 241 U. S. 591 21
United States v. *Ransom*, 263 U. S. 691, affirming 284 Fed. 108 20
United States v. *Richards*, 27 F. (2d) 284
United States v. *Rickert*, 188 U. S. 432 17
United States v. *Waller*, 243 U. S. 452 21, 22
Weilep v. *Audrain*, 36 Okla. 288, 128 Pac. 254 17
Williams v. *Johnson*, 239 U. S. 414 17

Statutes:

Act of March 24, 1832, 7 Stat. 366 9
Act of August 7, 1856, 11 Stat. 699 9
Act of February 8, 1887, c. 119, 24 Stat. 388, sec. 6 35
Act of March 3, 1893, c. 209, 27 Stat. 612:
Sec. 15 36
Sec. 16 36
Act of June 28, 1898, c. 517, 30 Stat. 495, sec. 30 36
Act of March 1, 1901, c. 676, 31 Stat. 861:
Sec. 3 37
Sec. 7 37
Act of March 3, 1901, c. 868, 31 Stat. 1447 35
Act of June 30, 1902, c. 1323, 32 Stat. 500, Sec. 16 11, 12, 38
Act of April 26, 1906, c. 1876, 34 Stat. 137, Sec. 19 25, 39
Act of June 16, 1906, c. 3335, 34 Stat. 267 39
Act of May 27, 1908, c. 199, 35 Stat. 312:
Sec. 2 41
Sec. 4 42
Sec. 9 42
Act of August 1, 1914, c. 222, 38 Stat. 582, Sec. 17 22
Act of May 10, 1928, c. 517, 45 Stat. 495:
Sec. 3 31, 43
Sec. 4 43
Sec. 5 44

Cases—Continued.	Page
Act of January 27, 1933, c. 23, 47 Stat. 777	44
Revenue Act of 1928, c. 852, 45 Stat. 791:	
Sec. 11	33
Sec. 12	33
Sec. 22	33
Sec. 143	22, 33
Sec. 161	34
Miscellaneous:	
O. D. 1130, 5 Cumulative Bulletin 237	23
L. O. 1098, 1: 1 Cumulative Bulletin 64	23
I. T. 1730, II: 2 Cumulative Bulletin 55	23
I. T. 1834, II: 2 Cumulative Bulletin 62	23
T. D. 3570 III: 1 Cumulative Bulletin 85	23
T. D. 3754, IV: 2 Cumulative Bulletin 37	23
S. M. 4527, IV: 2 Cumulative Bulletin 29	24
S. R. 8498, V: 1 Cumulative Bulletin 183	24
S. M. 5632, V: 1 Cumulative Bulletin 193	24
G. C. M. 2056, VI: 2 Cumulative Bulletin 65	24
G. C. M. 2098, VII: 1 Cumulative Bulletin 209	24
G. C. M. 6020, VIII: 1 Cumulative Bulletin 63	24
G. C. M. 8066, IX: 2 Cumulative Bulletin 316	24
G. C. M. 9021, X: 2 Cumulative Bulletin 111	24
H. Rep. No. 1454, 60th Cong., 1st Sess.	15
H. Rep. No. 1193, 70th Cong., 1st Sess.	31
H. Rep. No. 1567, 72d Cong., 1st Sess.	29
34 Op. A. G. 275	23
34 Op. A. G. 302	23
34 Op. A. G. 439	23
35 Op. A. G. 1	23
Regulations of the Secretary of the Interior, promulgated July 7, 1925	47
S. J. Res. 167, 72d Cong., 1st Sess., c. 65, 47 Stat. 807	27, 45
S. Rep. No. 575, 60th Cong., 1st Sess.	15
S. Rep. No. 982, 70th Cong., 1st Sess.	31
S. Rep. No. 797, 72d Cong., 1st Sess.	29
S. Rep. No. 830, 72d Cong., 1st Sess., p. 2	28

In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 817

SUPERINTENDENT FIVE CIVILIZED TRIBES, FOR SANDY FOX, CREEK NO. 1263, petitioner

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 11–18) is reported in 29 B. T. A. 635. The opinions of the Circuit Court of Appeals (R. 23–32) are reported in 75 F. (2d) 183.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 9, 1935 (R. 32). The peti-

tion for a writ of certiorari was filed March 26, 1935, and granted April 15, 1935 (R. 33). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION

The taxpayer is a full-blood Creek Indian. His property and income are restricted and held in trust for him by the Secretary of the Interior. Is his income from sources other than his original allotted lands subject to the Federal income tax?

STATUTES AND REGULATIONS INVOLVED

The pertinent parts of the Revenue Act involved will be found in Appendix A, *infra*, pp. 33–34. The pertinent agreements and statutes dealing with the Creek Indians will be found in Appendix B, *infra*, pp. 35–46. The pertinent regulations of the Interior Department will be found in Appendix C, *infra*, pp. 47–50.

STATEMENT

This is a proceeding for the redetermination of a deficiency in income taxes for the year 1929. The facts were stipulated (R. 9–10), and may be summarized as follows:

Sandy Fox (hereinafter called the taxpayer) is a full-blood restricted Creek Indian, being enrolled opposite Creek Roll No. NB1263. His property both real and personal is restricted and under the direct supervision of the Superintendent of the

Five Civilized Tribes, and under the direction and supervision of the Secretary of the Interior. The income from the taxpayer's allotment is received and held in trust by the Superintendent and invested by him under the direction of the Secretary of the Interior. The income interest from such investments is likewise received and held in trust as part of the taxpayer's restricted fund and property. (R. 9–10.)

For the year 1929 the Superintendent of Five Civilized Tribes filed for the taxpayer an income tax return, in which was included as a part of the net income, an amount of $7,797.42, representing interest upon the taxpayer's restricted funds (R. 8, 10). There was also included in said return an item of $8,351.75 received by said Superintendent as interest on Liberty Bonds held by him as a part of taxpayer's restricted funds. Neither of these sums was subject to taxpayer's demand (R. 10). The total net income thus reported was $16,149.17 (R. 6). The tax shown to be due on the return in the sum of $102.59 was paid by the taxpayer (R. 8).

During the year 1929, the Commissioner of Internal Revenue, under authority of Treasury Decision 3570, refunded to said Superintendent for the taxpayer certain taxes for the years 1914, 1915, and 1916 in the aggregate amount of $4,349.98. There was also refunded during 1929 interest on said refunds in the amount of $3,117.50, said interest being paid to said Superintendent for the taxpayer. This interest is part of taxpayer's restricted fund

and is not subject to his demand. This interest was not included in the 1929 tax return filed for the taxpayer. (R. 10.) The Commissioner added the amount of interest so received to the taxpayer's reported income and determined a deficiency of $167.00 (R. 5–6). From this determination, the Superintendent, on behalf of the taxpayer, appealed to the Board of Tax Appeals, where it was claimed not only that the Commissioner erred in including as income the interest paid in the amount of $3,117.50, but that taxpayer had erred in paying the tax previously reported, because he was not subject to the income tax law for the year 1929 (R. 7–8).

The Board of Tax Appeals in a decision reviewed by the Board held that the taxpayer was not exempt from taxation and sustained the Commissioner's determination (R. 11–18). The Circuit Court of Appeals, by a divided court, affirmed (R. 23–32).

SUMMARY OF ARGUMENT

The Revenue Act levies a tax on every individual on income derived from any source whatever. It clearly was intended to reach the income here in question, unless there is some statutory provision which, in plain language, creates an exemption. There is no such statute. Treaties and legislation dealing with the Five Civilized Tribes exempt from taxation only the original homestead allotment of forty acres and this only for a period of twenty-one years from the date of the homestead

deed, executed at some undisclosed date following the passage of the Act of 1902.

Even if we assume that a tax on income amounts to a direct tax on land, this only means that income from the homestead for this twenty-one-year period is exempt from income taxation. All other income, including interest on investments, is subject to tax.

The mere fact that the taxpayer's property and income are restricted does not exempt him from Federal taxation, nor does the fact that he is a restricted ward of the Government exempt him. This Court has frequently upheld a state tax imposed on a restricted Indian's restricted land. These are stronger reasons for upholding a Federal tax on his income.

The rulings of the Treasury Department, holding that income of the kind in question is taxable, have received legislative approval. The policy of Congress, in cases of this kind, has been one of taxation rather than of immunity.

ARGUMENT

Sandy Fox (hereinafter called the taxpayer) is a full-blood Creek Indian. His property, both real and personal, and the income therefrom, is restricted and under the direct supervision of the Superintendent of the Five Civilized Tribes. The question here is whether certain of this restricted income derived from sources other than the Indian's original allotted lands is exempt from Federal taxation.

As pointed out by the court below, if the exception exists, it must be either (1) because of the nature of the income or (2) because of the status of the taxpayer. We submit that the court was clearly right in holding that neither the character of the income here involved nor the status of the taxpayer respecting such income was such as to give rise to the claimed exemption.

The Sixteenth Amendment gave Congress the power to levy taxes on income, "from whatever source derived." Sections 11 and 12 of the Revenue Act of 1928 (Appendix A, *infra*; p. 33), levy a tax upon "the net income of every individual." Section 22 includes income "from any source whatever." Clearly this language is broad enough to include the income in controversy. By such comprehensive language, Congress intended to exercise its power to the fullest extent and to extend the income tax as far as it could to all species of income. *Heiner* v. *Colonial Trust Co.*, 275 U. S. 232, *Irwin v. Gavit*, 268 U. S. 161, 168; *Helvering* v. *Stockholms &c. Bank*, 293 U. S. 84.

We are met at the very outset, however, with the taxpayer's contention that the Revenue Act, being a general statute, was not intended to apply to the Indians, who are a special, favored class (Br. 9). This Court has definitely ruled against this broad assertion in *Choteau* v. *Burnet*, 283 U. S. 691, where, with reference to similar provisions in an earlier Act, it was said (pp. 694, 696):

> The intent of Congress was to levy the tax with respect to *all residents* of the United States *and upon all sorts of income.* The act does not expressly exempt the sort of income here involved, nor a person having petitioner's status respecting such income, and we are not referred to any other statute which does.
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> * * * * * *
>
> *The intent to exclude must be definitely expressed, where, as here, the general language of the Act laying the tax is broad enough to include the subject matter.* * * * (Italics supplied.)

See also *Goudy* v. *Meath,* 203 U. S. 146, 149; *The Cherokee Tobacco,* 11 Wall. 616; *Heiner* v. *Colonial Trust Co., supra; Brunt* v. *Commissioner,* 5 B. T. A. 134.[1]

Since Congress clearly intended to tax *all residents* of the United States, *upon all sorts of income* (language clearly broad enough to include the income here in question), we may start with the proposition that no exemption exists in this case unless there is some other statutory provision definitely expressing an intent to exclude. Since there is

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[1] Since those cases Congress has passed several Revenue Acts, making no exemption as to Indians. The rule of implied legislative approval is applicable. A consideration of the cases relied on by taxpayer (Br. 9), holding that general acts of Congress do not apply to Indians, shows that they are laws relative to "their personal and domestic relations with each other" (*Ex parte Crow Dog,* 109 U. S. 556, 570), and not revenue laws.

nothing in the Revenue Act which, even by implication, purports to exempt this income, the exemption, if any, must be found in some other Act of Congress.

The taxpayer relies principally upon the early treaties and statutes dealing with the Five Civilized Tribes. But there is nothing in these early treaties or acts which exempts either the Indian as such or his restricted income.

This Court has frequently had occasion to pass upon the legislation and treaties dealing with the Five Civilized Tribes. *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294; *Tiger* v. *Western Investment Co.*, 221 U. S. 286; *Heckman* v. *United States*, 224 U. S. 413; *Choate* v. *Trapp*, 224 U. S. 665; *English* v. *Richardson*, 224 U. S. 680; *United States* v. *Bartlett*, 235 U. S. 72; *Fink* v. *County Commissioners*, 248 U. S. 399; *Parker* v. *Richard*, 250 U. S. 235; *Sunderland* v. *United States*, 266 U. S. 226; *Shaw* v. *Oil Corp.*, 276 U. S. 575; *Carpenter* v. *Shaw*, 280 U. S. 363. A brief résumé may be helpful.

The Five Civilized Tribes originally inhabited large areas in the southern part of the United States, east of the Mississippi. As this territory became settled the Indian was pushed westward. By treaty and use of force the tribes agreed to take up their abode farther west, out of the way of the white man, on land thereafter designated as Indian territory. It was part of the consideration for the removal that the Indians should pos-

sess this territory unmolested forever, as an independent people, with their own forms of government. Freedom from state or territorial government was guaranteed to them. See Act of March 24, 1832, 7 Stat. 366, 368; Act of August 7, 1856, 11 Stat. 699, 700.

But the white population gradually encroached upon Indian territory. In 1894 it was estimated that one-quarter of a million people had taken up their habitation there. These people desired to substitute their own methods of government for the unsatisfactory tribal administration. However, statehood could not be granted without violating existing Indian treaties. Finally, by Act of March 3, 1893, 27 Stat. 612 (Appendix B, *infra*, p. 36), the Commission of the Five Civilized Tribes, commonly referred to as the Dawes Commission, was created to enter into negotiations with the Five Civilized Tribes for the purpose of extinguishing the national or tribal title to all lands in that territory by alloting it in severalty to the individual Indians. After considerable negotiation the lands of the Muscogee or Creek Tribe were allotted in severalty, pursuant to an agreement known as the Original Creek Agreement (Act of March 1, 1901, c. 676, 31 Stat. 861, Appendix B, *infra*, p. 37). This agreement was amended by the Supplemental Creek Agreement of 1902 (Act of June 30, 1902, 32 Stat. 500, c. 1323, Appendix B, *infra*, p. 38). This supplemental agreement was ratified by the action of the Creek National Council, and approved

by the President of the United States, August 8, 1902. See *Tiger* v. *Western Investment Co.*, *supra*, 221 U. S. 286, 301.[3]

The way was thus cleared for the creation of the State of Oklahoma. But in the enabling Act (c. 3335, 34 Stat. 267, Appendix B, *infra*, p. 39), it was expressly provided that nothing contained in the constitution of the State of Oklahoma should be construed as limiting or impairing the rights of persons or property pertaining to the Indians of Oklahoma Territory (so long as such rights should remain unextinguished), or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise.

In considering the various Acts of Congress affecting the Creek Indians, it is important to bear in mind that two types of Acts are involved. First, there are those Acts under which allotments were made and accepted. These Acts embody specific contracts or agreements with the Indian, and under them the Indian acquired certain vested rights of which Congress could not later deprive him. Second, there were the subsequent enactments of Congress which were in no sense contractual, and under which Congress was merely legislating with respect to the Indian.

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[3] The pertinent provisions of the various statutes concerning the allotment of lands to the Creeks are set forth in Appendix B, *infra*, pp. 35–45.

The Original Creek Agreement (Act of March 1, 1901), *infra*, p. 37, and the Supplemental Creek Agreement (Act of June 30, 1902), *infra*, p. 38, above referred to, were of the first type. They were in reality contracts with the Indians, and under them the Indian acquired certain vested rights. *Choate* v. *Trapp*, *supra*, 224 U. S. 665; *Carpenter* v. *Shaw*, *supra*, 280 U. S. 363. An examination of these two agreements reveals two important features as affecting this case. First, as an inducement to the Indian to forsake his former mode of living and accept allotments in severality, the agreements made certain concessions to him, chief among which, so far as this case is concerned, was the exemption of his homestead allotment from taxation. Second, realizing that the untutored Indian would be subject to the schemes and fraudulent practices of unscrupulous white men, Congress placed certain restrictions upon the alienation of the allotted lands and made provision for the supervision of Indian affairs by the Secretary of the Interior. These two features are clearly set forth in Section 7 of the Original Agreement of March 1, 1901, as amended by Section 16 of the Supplemental Agreement of June 30, 1902 (Appendix B, *infra*, p. 38). This Supplemental Agreement, after providing for the allotment to each Creek Indian of 160 acres of land, further provides:

> *Lands* allotted to citizens shall not
> * * * be *alienated* by the allottee or his

> heirs before the expiration of *five years* from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior. * * * (Italics supplied.)

Clearly this restriction on alienation was designed to protect the Indian against his own improvidence and to protect him from schemes and fraudulent practices of white men. *Sunderland* v. *United States, supra; Choctaw Lumber Co.* v. *Coleman*, 56 Okla. 377; *Crosbie* v. *Partridge*, 85 Okla. 186. But the agreement continues:

> Each citizen shall select from his allotment *forty acres of land*, * * * *as a homestead*, which shall * * * remain *nontaxable; inalienable*, and free from any incumbrance whatever for *twenty-one years* * * *. (Italics supplied.)

This is the only provision in either the original Creek Agreement or in the Supplemental Agreement relating to the subject of tax exemption. Under it the Indian acquired a vested right to hold his homestead tax-free for twenty-one years. *Choate* v. *Trapp, supra; Carpenter* v. *Shaw, supra.* But, clearly, there is nothing in this provision that, even by implication, exempts the sort of income involved in this case or a person having the taxpayer's status respecting such income. The provision is explicit. Of the total allotment of 160 acres, only the homestead of forty acres was made tax-exempt. *English* v. *Richardson, supra,* 224

U. S. 680. The exemption attached only to this particular land; it was not a personal privilege. *Choate* v. *Trapp, supra,* 224 U. S. 665, 675–676. The Indian, as such, was not made exempt, although it would have been a simple matter to have so provided had it been so intended. In thus specifically exempting the homestead, it seems clear enough, at least so far as the Federal taxing power was concerned, that all other property of the Indian, including the income therefrom, was left open to taxation. The doctrine of *expressio unius est exclusio alterius* is applicable.

The parties agreed only that the Indian's homestead should be tax-exempt. They made no agreement respecting the Government's right later to levy an income tax. The most that can be said of this agreement is that since the homestead was made tax-exempt, this might also operate to exempt the income derived from such homestead. This would be true only because a tax on such income might be deemed a direct tax on the homestead itself. *Pollock* v. *Farmers' Loan & Trust Co.,* 158 U. S. 601.[3] But this exemption, if it existed, would

[3] Even this is doubtful. In *People* v. *Wendell,* 188 N. Y. S. 344, 347, affirmed, 231 N. Y. 629, it was held that *income* from a mortgage was taxable despite a provision of law that the *mortgage* should be nontaxable. It was argued that a tax on income was in reality a tax on the property producing the income, citing *Pollock* v. *Farmers' Loan & Trust Co., supra,* but the court held that its problem was one of statutory construction and the intent of the legislature, and that such income was not exempt. This

be limited strictly to income produced by the homestead. Income produced by the other allotted land would be taxable. *Rentie* v. *Commissioner*, 21 B. T. A. 1230. Clearly, such exemption would not extend to the income here in question, which was derived, not from any of the Indian's lands, but from surplus funds invested by the Superintendent. Moreover, the exemption on the homestead was for only twenty-one years, from the date of the homestead deed, which date is not disclosed by this record. Thereafter, all income, including even the income from the homestead, was clearly taxable.

We submit there is nothing in either the original Creek Agreement or in the Supplemental Agreement which supports an exemption in this case.

The taxpayer relies (Br. 7) on the Act of May 27, 1908, c. 199, 35 Stat. 312 (Appendix B, *infra*, p. 40). This Act was of the second of the two types of Acts referred to above. As shown by its title it was designed simply to remove certain restrictions from some of the lands previously allotted to the

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case would seem applicable here. It can hardly be said that the parties to this agreement contracted with respect to Federal income taxation.

When this agreement was executed (1902), neither the Indians nor the Government had in mind the subject of income taxes. No such tax was then in existence. The Act of 1894 had been declared unconstitutional in 1895 and the Sixteenth Amendment was not adopted until 1913. Evidently the parties to the Agreement were interested only in securing an exemption from state taxation, since at that time the Federal Government levied no real estate tax, and, in view of the apportionment requirement, none was likely.

Indian. It in no sense embodied a contract or agreement with the Indian. It did not affect the rights of the Indians vested under the Supplemental Agreement of 1902, discussed above. *Choate* v. *Trapp, supra.* The Indian acquired no vested right in a public law of this kind, *Silver* v. *Silver,* 280 U. S. 117, 122, and it is difficult to see how this Act passed in 1908, at a time when we had no income-tax laws, can be held to qualify a later revenue Act levying a tax broadly on "every individual" upon income "from whatever source derived."

In any event the Act nowhere confers the privilege of tax-exemption. The only reference to taxation is in Section 4, *infra,* which provides that "all land from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes." As pointed out in *Shaw* v. *Oil Corp., supra,* 276 U. S. 575, 581, this section was adopted in response to representations that the revenue of the State of Oklahoma was insufficient for state purposes, that large areas of land within the State allotted to Indians were exempt from taxation as agencies of the Federal Government and that Indian citizens were enjoying the benefits of local government without taxation. Report of Senate Committee on Indian Affairs, S. Rep. No. 575, 60th Cong. 1st Sess.; Report of the House Committee on Indian Affairs, H. Rep. No. 1454, 60th Cong., 1st Sess. Thus this section served only to *remove* a

limitation theretofore existing on the *state's* power to tax certain *lands*. It in no way *imposed* a limitation on the *Federal Government's* power to tax the Indian's *income*. Nowhere does the Act exempt the Indian, as such, from taxation,[4] nor even, by implication, much less by clear expression, is the Indian's income made exempt. As stated in *Shaw* v. *Oil Corp., supra*, p. 581: "The Act of May 27, 1908, contains no express exemption from taxation of the proceeds of restricted lands." We submit there is nothing in the Act of 1908 that exempts the sort of income here involved or a person having the taxpayer's status respecting such income.

The taxpayer contends (Br. 9) that inalienability and nontaxability are natural concomitants and that it was the removal of restrictions by Section 4 of the 1908 Act that alone subjected an Indian's lands to any form of taxation, and since the taxpayer's income here was restricted, it should remain nontaxable until the restrictions are removed. But, as was pointed out in *Choate* v. *Trapp, supra*, 224 U. S. 665, 673, exemption from taxation and nonalienability are two separate and distinct subjects. One conferred a right that could not be taken away. The other imposed a limitation that

[4] On the contrary, Sections 4 and 9 of the Act, *infra*, p. 42, expressly subject a full-blood Indian, taking land by inheritance, to state taxation, despite his status, and it has been held that such full-blood may be taxed on the income from lands so inherited. *Pitman* v. *Commissioner*, 64 F. (2d) 740 (C. C. A. 10th); *Bagby* v. *United States*, 60 F. (2d) 80 (C. C. A. 10th).

Congress could remove at will. Moreover, the period of restriction and the period of nontaxation by the State were not necessarily the same. See also *Williams* v. *Johnson*, 239 U. S. 414, 420; *Jones* v. *Meehan*, 175 U. S. 1; *Weilep* v. *Audrain*, 36 Okla. 288, 128 Pac. 254; *Farris* v. *Union Cent. Life Ins. Co.*, 72 Okla. 220, 179 Pac. 919.

True, the State might not tax Indian lands prior to the removal of restrictions under Section 4 of the Act, but this is not because of any exemption conferred on the Indian by the Act, but because lands allotted to Indians remain subject to the control of Congress during the restrictive period, and, as Federal instrumentalities, cannot be taxed by the State without the assent of the Federal Government. *The Kansas Indians*, 5 Wall. 737; *United States* v. *Rickert*, 188 U. S. 432; *Gillespie* v. *Oklahoma*, 257 U. S. 501; *Childers* v. *Beaver*, 270 U. S. 555. But it does not follow, merely because the State may not tax lands prior to the removal of restrictions, that the Federal Government may not tax income prior thereto. As pointed out in *Heiner* v. *Colonial Trust Co.*, *supra*, Congress has been disposed to extend the income tax to all species of income despite immunity from state taxation. The compensation of many Federal officials is taxed under the 1928 Act here involved, and income from Government bonds is taxed, except when expressly exempted. *Helvering* v. *Stockholms Etc. Bank*, *supra*, 293 U. S. 84. As stated in *Chotean* v. *Burnet*, *supra*, p. 696:

> Royalties received by the government from mineral leases of Indian lands have been held to be beyond a State's taxing power (*Gillespie* v. *Oklahoma*, 257 U. S. 501; *Shaw* v. *Oil Corp.*, 276 U. S. 575) on the ground that, while in the possession of the United States they are a federal instrumentality, to be used to carry out a governmental purpose. *It does not follow, however, that they cannot be subject to a federal tax.* * * *. (Italics supplied.)

Moreover, it is to be observed that Section 1 of the Act gives the Secretary of the Interior general supervisory power over the proceeds from the sale or lease of allotted lands as well as over the lands themselves. *Parker* v. *Richard*, 250 U. S. 235; *Parker* v. *Riley*, 250 U. S. 66. The statute also gives the Secretary general power to remove restrictions, in whole or in part. Under his regulations (Appendix C, *infra*, p. 47), the Secretary provides for the unconditional removal of restrictions from the land of those Indians whom he may deem competent. He also authorizes the payment of restricted funds direct to competent Indians. Many Indians have been thus emancipated. Not so in this case, because the Secretary has not deemed this Indian competent to handle his own affairs. The significant point is that the restriction in this case exists, not by virtue of any express Act of Congress, but solely by virtue of the discretionary power conferred on the Secretary. But this discretionary action of the Secretary in continuing to impose re-

strictions on investments made by him for the Indian is not to be taken as the exercise by Congress of its power to exempt such investments or income therefrom from Federal taxation.

In *Shaw* v. *Oil Corp., supra,* 276 U. S. 575, this Court held that the mere act of the Secretary in imposing restrictions on lands purchased under his supervision for a full-blood Creek Indian with trust funds of that Indian, did not operate to exempt such lands from state taxation. There the Court said (pp. 578, 581, 582):

> * * * the mere act of the Secretary in imposing the restriction is not the exercise of any power which may reside in Congress to exempt them [restricted lands] from taxation.
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> * * * * * *
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> Little need be said as to the power of the Secretary of the Interior to exempt the land and its uses from taxation. The power, if it exists, is one conferred by Congress, but neither it nor the Secretary has in terms purported to make or authorize such an exemption.
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> *It cannot be assumed that Congress* at a time when it was withdrawing allotted lands from their former exemption in order that Indian citizens might assume the just burdens of state taxation, *intended to extend a tax exemption by implication.* In any case the Secretary of the Interior has never, by rule or regulation or other action, purported

> to exempt such lands from state taxation. *No such action is to be implied from his authorized action in restricting the power of the Indian grantee to alienate the land.* * * * (Italics supplied.)

See also to the same effect, *United States* v. *Ransom*, 263 U. S. 691, affirming 284 Fed. 108 (C. C. A. 8th); *McCurdy* v. *United States*, 246 U. S. 263; *United States* v. *Gray*, 284 Fed. 103 (C. C. A. 8th); *United States* v. *Brown*, 8 F. (2d) 564 (C. C. A. 8th), certiorari denied, 270 U. S. 644; *United States* v. *Mummert*, 15 F. (2d) 926 (C. C. A. 8th). Since restrictions imposed by the Secretary do not exempt the Indian's lands from state taxation, we submit, *a fortiori* such restrictions do not exempt his income from Federal taxation.

But the taxpayer contends that the Indian is a ward of the Government and that the tax as to him is inconsistent with its policy toward him as a protector and conservator (Br. 9). But we submit the contrary is true. The taxpayer here became a citizen of the United States by virtue of Section 6 of the Act of February 8, 1887, as amended by the Act of March 3, 1901 (Appendix B, *infra*, p. 35). See also *Tiger* v. *Western Investment Co.*, *supra*, 221 U. S. 286. As pointed out in *Goudy* v. *Meath*, *supra*, 203 U. S. 146, 149, among the laws to which he, as a citizen, became subject, were those in respect to taxation. His property, unless exempt, became subject to taxation in the same manner as property belonging to other citizens, and the rule

of exemption for him must be the same as for other citizens; that is, that no exemption exists by implication, but must be clearly manifested. There is nothing inconsistent between this obligation of the taxpayer as a citizen, and the supervisory control exercised by the Interior Department over the Indian's property in his own interest. Since "there is nothing in citizenship incompatible with this guardianship" (*Heckman* v. *United States*, 224 U. S. 413, 436–437; *Brader* v. *James*, 246 U. S. 88, 96; *Tiger* v. *Western Investment Co.*, *supra*; *United States* v. *Nice*, 241 U. S. 591, 598), there is no inconsistency between guardianship and taxation.

On the other hand, it has been the progressive purpose of Congress gradually to relinquish control over the Indian's properties and affairs in order to educate him in responsibility, and prepare him for complete independence. As stated in *Choteau* v. *Burnet*, *supra* (p. 694):

> This plan has included imposing upon him both the responsibilities and the privileges of the owner of property, *including the duty to pay taxes.* * * *. (Italics supplied.)

See also *Shaw* v. *Oil Corp.*, *supra*, p. 579; *United States* v. *Nice*, *supra*, 241 U. S. 591, 598; *United States* v. *Waller*, 243 U. S. 452, 459; *McCurdy* v. *United States*, *supra*, 246 U. S. 263, 269.

Immunity from taxation would be inconsistent with one of the very purposes of Indian adminis-

tration—to educate the Indian in responsibility. *Shaw* v. *Oil Corp.*, *supra*, p. 381.

The relationship between the Government and the Indian is not essentially different from the usual guardianship relation. *Tiger* v. *Western Investment Co.*, *supra*, pp. 310–317; *United States* v. *Waller*, *supra*, p. 459. A guardian appointed to handle a minor's affairs must, under the Revenue Acts, report his ward's income. The fact that such ward cannot demand the full income to dispose of as he pleases does not exempt such income from taxation. So it is in this case. The fact that the Superintendent accumulated the income in trust for the benefit and ultimate use of the Indian, and the fact that such income was not subject to the taxpayer's immediate demand, does not create an exemption. See *Bagby* v. *United States*, 60 F. (2d) 80 (C. C. A. 10th).* And since a guardian for a minor is entitled to a fair compensation for his services on his ward's behalf, we see no reason why these Indian wards of the Government should not bear their full share of the tax burden.

That Congress never intended this income to escape taxation is made clear when we consider the

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* Section 143 (a) of the 1928 Revenue Act, *infra*, p. 33, requires "every fiduciary" to make a return for any individual, estate, or trust for which he acts. Such comprehensive language clearly covers this case, there being no exception made for trust estates of this character. The tax return in this case was properly filed by the Superintendent as guardian for the taxpayer. See Act of August 1, 1914, c. 222, Sec. 17, 38 Stat. 582, 598.

rulings of the Treasury Department, together with subsequent legislation on the subject.

At first the Treasury took the position that income from all original allotted lands was taxable (O. D. 1130, 5 Cumulative Bulletin 237; L. O. 1096, I—1 Cumulative Bulletin 64; I. T. 1730, II—2 Cumulative Bulletin 55), unless there was some specific agreement as to tax exemption in the Act under which lands were allotted (I. T. 1884, II—2 Cumulative Bulletin 62). Shortly thereafter the Attorney-General promulgated a series of rulings, upon which the taxpayer here relies (Br. 10–12). 34 Op. A. G. 75; 34 Op. A. G. 302; 34 Op. A. G. 439; 35 Op. A. G. 1. These rulings held that income from "allotted" lands, restricted by Congress against alienation, was not subject to the Federal income-tax laws during the restricted period.*

Two of these opinions were published by the Treasury Department in 1924 and 1925 as T. D. 3570 (III—1 Cumulative Bulletin 85) and T. D. 3754 (IV—2 Cumulative Bulletin 87). These opinions of the Attorney General, the Treasury accepted in part and rejected in part. They were construed as holding only that income from certain original allotted lands was exempt. But the

* Insofar as certain "dicta" in those opinions seem to support the taxpayer's position that the Revenue Acts do not apply to Indians as such, they must be regarded as unsound in view of the later opinions of this Court in *Choteau* v. *Burnet*, *supra*, *Heiner* v. *Colonial Trust Co.*, *supra*, and other cases cited above.

Treasury rejected the extreme view that the Indian as such was exempt from taxation, and ever since 1925 its position has been, at least so far as the Five Civilized Tribes are concerned, that income from original allotments, homestead or surplus, or such portion thereof as still remains in the hands of the original allottee as restricted lands is exempt from taxation, but that income from all other sources, including investment income of the kind here in question, is subject to tax. S. M. 4527, IV—2 Cumulative Bulletin 29; S. R. 8498, V—1 Cumulative Bulletin 183; S. M. 5632, V—1 Cumulative Bulletin 193; G. C. M. 2056, VI—2 Cumulative Bulletin 65; G. C. M. 2008, VII—1 Cumulative Bulletin 209; G. C. M. 6020, VIII—1 Cumulative Bulletin 63; G. C. M. 8066, IX—2 Cumulative Bulletin 316; G. C. M. 9621, X—2 Cumulative Bulletin 111.

In thus extending the exemption to all income from all allotted lands (homestead and surplus) of all members of the Five Tribes, the Treasury has been liberal with the Creek Indians. As pointed out above, any exemption must be found in the original agreements with the Indians, under which allotments were made, or in some other definite expression of Congress. In some of the original Indian Agreements, notably those with the Choctaws and Chickasaws (see *Choate* v. *Trapp, supra,* 224 U. S. 665, 668) the agreement was that *all* allotted lands should be nontaxable so long as title remains in the original allottee. As to such Indians it might

be said that income from such lands while held by the original allottee was also made exempt under the rule of the *Pollock* case, *supra,* although even this is doubtful. See footnote 3, *supra,* p. 13. Whatever the rule as to other Indians, so far as the Creeks are concerned, the only provision as to tax exemption is found in the Supplemental Creek Agreement of 1902, which, unlike in the case of the Choctaws and Chickasaws, exempted only the forty-acre homestead for twenty-one years (*English* v. *Richardson, supra,* 224 U. S. 680), other allotments were not exempted. So if any income-tax exemption ever existed as to the Creeks it was limited to the income from this forty acres for the twenty-one year period only. In its rulings above referred to the Treasury has apparently failed to differentiate between the various Indians and, as to the Creeks, liberally extends the exemption to income from their surplus allotments as well as from their homestead.[7]

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[7] A reference to the above-mentioned Treasury rulings will show that the Treasury has been influenced partly by the rulings of the Attorney General and partly by the fact that the Act of April 26, 1906, c. 1876, 34 Stat. 137, 144, Appendix, *infra,* p. 39, provided that:

"* * * all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as title remains in the original allottee."

It was thought that this statute conferred a specific exemption on the income as well as the land during the restricted period. But it is to be noted that this was only an Act of Congress and was not a contract or treaty with the Indian. It dealt with State, not Federal, taxation. It

But whether right or wrong in thus extending the exemption, the Treasury was clearly right in holding income from other sources, including investment income of the kind here in question, to be taxable. Whatever may be said of the early Indian treaties and statutes, they clearly do no more than exempt certain of the Indian lands. Any claim that Indian income is exempt must be predicated on the contention that a tax on the income is a direct tax on the land itself. Even if we concede, *arguendo*, that the original allotted lands remained nontaxable while restricted in the hands of the original allottee, and concede also that income from such lands also remained nontaxable, yet we are not here concerned with income derived from nontaxable land. The source of the income here is not the taxpayer's original allotted lands, but funds invested for the Indian by the Superintendent. The source of these investments is not shown by the record. The investments may have been with accumulated income from allotted homestead lands, or from allotted surplus lands or with proceeds from the sale of unallotted tribal lands credited to this Indian's account. In any event the source of the income in question is not the orig-

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related to taxes on land, not income, and finally it was superseded by the Act of May 27, 1908, relating to the same subject matter. *Coleman* v. *Davis*, 72 Okla. 248, 180 Pac. 281; *Chapco* v. *Chapman*, 76 Okla. 201, 170 Pac. 250, certiorari denied, 247 U. S. 508; cf. *Fink* v. *County Commissioners*, *supra*, 243 U. S. 390, 402. We think the Treasury has made too much of the Act of 1906.

inal allotment. When the funds producing the income were invested they became an independent source of income, which was not protected from taxation either by the Revenue Act of 1928 or by prior Acts of Congress under which the allotments were made. See *Snell v. Commissioner*, 10 B. T. A. 1081.

These rulings of the Treasury Department, published at various times since 1925, and holding that income of the kind here involved is taxable, have received implied Congressional approval through the reenactment, without pertinent change, of the Revenue Acts of 1926, 1928, 1932, and 1934. This approval is more definitely shown in a Joint Resolution of Congress, passed February 14, 1933 (No. 53, 72nd Cong., 1st Sess. [S. J. Res. 167]), Appendix B, *infra*, p. 45, which provides in part as follows:

> To carry out certain *obligations* to certain enrolled Indians *under tribal agreement*. * * * any person duly enrolled as a member of an Indian tribe who received in pursuance of a *tribal treaty* or *agreement* with the United States an *allotment of land which by the terms of said treaty or agreement was exempted partially or in total from taxation*, and from which land the restrictions *have been or have not been removed* and who was required or permitted contrary to law to pay any illegal or unauthorized Federal inheritance tax or Federal income tax on the rents, royalties, or other gains arising

> *from such allotted lands,* and who *under the law and rulings of the Treasury Department* have secured a refund of the taxes so illegally or erroneously collected but who did not receive interest on such refunds * * *, shall be allowed one year after the approval of this Act within which to file such claim, * * * it not being the policy of the Government to invoke or plead a statute of limitations to escape the *obligations of agreements* solemnly entered into with its Indian wards: * * * (Italics supplied.)

This resolution, we submit, clearly shows that Congress approved of the tax here in question. The purpose of this resolution is set forth in Senate Report No. 830, 72d Cong., 1st Sess., p. 2, as follows:

> The purpose of this resolution is to permit Indians who have received refunds of Federal inheritance or income taxes to file claims for interest also within a year from the passage of the resolution where interest was not included in the prior claim for refund of taxes. The filing of such claims in some cases at least would now be barred by the decision of the United States Circuit Court of Appeals in the case of *United States* v. *Richards* (27 Fed. (2) 284).
>
> Many of our Indians were guaranteed exemption from taxation on certain lands *by agreement* made with the Federal Government pursuant to the allotment of their tribal lands to individual members of the tribes, and it has been held that such exemp-

tion is a vested contractual property right which cannot legally be denied the Indians by Congress (*Choate* v. *Trapp*, 224 U. S. 665). In such cases the lands were therefore tax exempt for the specified period even though the restrictions be removed, and it follows that the income therefrom during such period of exemption from taxation is also nontaxable, pursuant to the decision of the Supreme Court of the United States in the case of *Pollock* v. *Farmers' Loan & Trust Company* (157 U. S. 429; 158 U. S. 601). By section 1 of the act of May 27, 1908 (35 Stat. L. 312), the restrictions were removed from the tax-exempt lands of a large number of Five Civilized Tribes allottees, and Federal income taxes have been collected from some of these Indians, since the removal of restrictions from their lands, on income received from lands that were tax exempt, which income was not subject to tax under the above-mentioned decision. (Italics supplied.)

See also Senate Report No. 797, 72d Cong., 1st Sess.; House Report No. 1567, 72d Cong., 1st Sess.

This resolution and the reports thereon show that Congress clearly recognized the distinction between income from tax exempt lands and income from other sources. They clearly contemplate that tax exemption should extend only to income from "allotted" lands which were specifically made exempt by "tribal treaty or agreement." This was an express recognition of the tax-exempt provi-

sions of the various "treaties and agreements" made with the Five Civilized Tribes and can only mean that all other income was deemed taxable.*

Moreover, the resolution dealt with income from tax exempt allotted lands irrespective of whether or not restrictions had been removed from the lands, thus clearly recognizing that the exemption depended upon tribal treaties or agreements, and not upon the question of whether or not the property or income was restricted.

It is to be observed, also, that the policy of the Government is clearly stated in the resolution to be the recognition of "the *obligations of agreements* solemnly entered into with its Indian wards." It was, therefore, not the policy to exempt the Indian merely because he was a ward of the Government.

Finally, it is to be noted that the resolution dealt with refunds made "under the law and rulings of the Treasury Department." We respectfully submit that this reference must have been to the existing practice in the Treasury Department as evidenced by the rulings above referred to. The resolution, therefore, is to be taken as a *pro tanto*

* The reference to "tribal treaty or agreement", so far as the Creeks were concerned, could only mean the Supplemental Creek Agreement of 1902, by which it was agreed that the forty-acre homestead was tax-exempt for 21 years. This was the only "tribal treaty or agreement" as affecting this case. The Acts of 1906 and 1908 were not such treaties or agreements. The reports referred to above bear us out in this.

approval of the rulings of the Treasury Department.

As further indicating Congressional approval of this practice, reference is made to the Act of May 10, 1928, c. 517, 45 Stat. 495, *infra*, p. 42. Section 3 of that Act provides that "all minerals, including oil and gas, produced on or after April 26, 1931, from restricted allotted lands * * *, shall be subject to all State and Federal taxes of every kind and character * * *."

We may assume that when this Act was passed Congress was familiar with the then position of the Treasury Department. See H. R. 1193, 70th Cong. 1st Sess.; S. R. 982, 70th Cong., 1st Sess. As stated above this position was that income from restricted allotments was tax-exempt, but income from other sources was subject to tax. But Congress was not content that even so much of the Indian's income should escape taxation. Far from pronouncing a policy of tax immunity to all Indian wards, Congress provided specifically that beginning April 26, 1931, the Indian should pay taxes on all mineral produced by his properties—even that produced by his restricted homestead.[9]

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[9] The fact that the Act was prospective from April 26, 1931 (the date of the removal of restrictions under the 1908 Act), does not mean that Congress was thereby sanctioning tax exemption of royalties produced by restricted allotments prior to that date. Section 5 of the Act, providing that "this Act shall not be construed * * * to exempt from taxation any lands which are subject to taxation under existing law", would indicate that Congress was leaving

It is to be noted that only "all minerals, including oil and gas", produced "from restricted allotted lands" were specifically made subject to the income tax. No mention was made of income of the sort here involved, for the obvious reason, we submit, that Congress, knowing of the existing Treasury position, deemed such taxable, anyway, and no specific provision was needed. There could have been no purpose in subjecting royalties from homesteads and other restricted allotments to tax and at the same time leaving investment income immune from tax.

We submt this Act of Congress indicates approval of the Treasury's then position that investment income of a restricted Indian was taxable, and a *pro tanto* disapproval of the position that income from his restricted allotments was nontaxable.

CONCLUSION

The decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

STANLEY REED,
Solicitor General.
FRANK J. WIDEMAN,
Assistant Attorney General.
J. W. MORRIS,
J. P. JACKSON,
Special Assistants to the Attorney General.
MAY 1935.

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open the question of the taxability of such income under prior laws. Apparently the Act was passed to remove doubt on the subject, not to change the law.

APPENDIX A

Revenue Act Involved

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 11. NORMAL TAX ON INDIVIDUALS.

There shall be levied, collected, and paid for each taxable year upon the net income of every individual a normal tax * * *

SEC. 12. SURTAX ON INDIVIDUALS.

(a) Rates of surtax. There shall be levied, collected, and paid for each taxable year upon the net income of every individual a surtax * * *

SEC. 22. GROSS INCOME.

(a) General definition. "Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

SEC. 143. FIDUCIARY RETURNS.

(a) Requirement of return. Every fiduciary * * * shall make under oath a return for any of the following individuals, estates, or trusts for which he acts, stating specifically the items of gross income thereof and the deductions and credits allowed under this title.

SEC. 161. IMPOSITION OF TAX.

(a) Application of tax. The taxes imposed by this title upon individuals shall apply to the income of estates or of any kind of property held in trust, * * *

APPENDIX B

TREATIES AND LEGISLATION AFFECTING THE CREEK NATION AND THE FIVE CIVILIZED TRIBES

Act of February 8, 1887, c. 119, 24 Stat. 388, 390:

> SEC. 6. * * *. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life,[1] is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.

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[1] Act of March 3, 1901, c. 868, 31 Stat. 1447:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section six of chapter one hundred and nineteen of the United States Statutes at Large numbered twenty-four, page three hundred and ninety, is hereby amended as follows, to wit: After the words "civilized life," in line thirteen of said section six, insert the words "and every Indian in Indian Territory."

Act of March 3, 1893, c. 209, 27 Stat. 612, 645:

SEC. 15. The consent of the United States is hereby given to the allotment of lands in severalty not exceeding one hundred and sixty acres to any one individual within the limits of the country occupied by the Cherokees, Creeks, Choctaws, Chickasaws, and Seminoles; and upon such allotments the individuals to whom the same may be allotted shall be deemed to be in all respects citizens of the United States. * * *

SEC. 16. The President shall nominate and, by and with the advice and consent of the Senate, shall appoint three commissioners to enter into negotiations with the Cherokee Nation, the Choctaw Nation, the Chickasaw Nation, the Muscogee (or Creek) Nation, the Seminole Nation, for the purpose of the extinguishment of the national or tribal title to any lands within that Territory now held by any and all of such nations or tribes, either by cession of the same or some part thereof to the United States, or by the allotment and division of the same in severalty among the Indians * * *.

Act of June 28, 1898, c. 517, 30 Stat. 495, 514:

SEC. 30. That the agreement made by the Commission to the Five Civilized Tribes with the commission representing the Muscogee (or Creek) tribe of Indians on the twenty-seventh day of September, eighteen hundred and ninety-seven, as herein amended, is hereby ratified and confirmed * * *.

* * * * *

1. There shall be allotted out of the lands owned by the Muscogee or Creek Indians in the Indian Territory to each citizen of said nation one hundred and sixty acres of land. * * *

* * * * *

5. The United States shall put each allottee in unrestricted possession of his allotment and remove therefrom all persons objectionable to the allottee.

* * * * *

34. Neither the town lots nor the allotment of land of any citizen of the Muscogee or Creek Nation shall be subjected to any debt contracted by him prior to the date of his patent.

* * * * *

Act of March 1, 1901, c. 676, 31 Stat. 861:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the agreement negotiated between the Commission to the Five Civilized Tribes and the Muscogee or Creek tribe of Indians at the city of Washington on the eighth day of March, nineteen hundred, as herein amended, is hereby accepted, ratified, and confirmed, * * *

* * * * *

3. All lands of said tribe, except as herein provided, shall be allotted among the citizens of the tribe by said commission so as to give each an equal share of the whole in value, as nearly as may be, in manner following: There shall be allotted to each citizen one hundred and sixty acres of land—boundaries to conform to the Government survey—which may be selected by him so as to include improvements which belong to him * * *

* * * * *

7. Lands allotted to citizens hereunder shall not in any manner whatsoever, or at any time, be incumbered, taken, or sold to secure or satisfy any debt or obligation con-

tracted or incurred prior to the date of the deed to the allottee therefor and such lands shall *not be alienable* by the allottee or his heirs at any time before the expiration of five years from the ratification of this agreement, except with the approval of the Secretary of the Interior.

Each citizen shall select from his allotment forty acres of land as a homestead, which shall *be nontaxable and inalienable* and free from any incumbrance whatever for twenty-one years, for which he shall have a separate deed, conditioned as above. * * *. (Italics supplied.)

Act of June 30, 1902, c. 1323, 32 Stat. 500, 503:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following supplemental agreement, submitted by certain commissioners of the Creek tribe of Indians, as herein amended, is hereby ratified and confirmed * * *.

* * * * * *

16. Lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior. Each citizen shall select from his allotment forty acres of land, or a quarter of a quarter section, as a homestead, which shall be and remain nontaxable, *inalienable,* and free from any incumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which

this condition shall appear. (Italics supplied.)

* * * * *

Act of April 26, 1906, c. 1876, 34 Stat. 137, 144:

SEC. 19. That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this Act, unless such restriction shall, prior to the expiration of said period, be removed by Act of Congress; and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior: *Provided, however,* That such full-blood Indians of any of said tribes may lease any lands other than homesteads for more than one year under such rules and regulations as may be prescribed by the Secretary of the Interior; * * *: *Provided further,* That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee.

Act of June 16, 1906, c. 3335, 34 Stat. 267, 270:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the inhabitants of all that part of the area of the United States now constituting the Territory of Oklahoma and the Indian Territory, as at present described, may adopt a constitution and become the State of Oklahoma, as hereinafter provided: *Provided,* That nothing contained in the said constitution

shall be construed to limit or impair the rights of person or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this Act had never been passed.

* * * * *

Third: That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian, tribe, or nation; and that until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States. That land belonging to citizens of the United States residing without the limits of said State shall never be taxed at a higher rate than the land belonging to residents thereof; that no taxes shall be imposed by the State on lands or property belonging to or which may hereafter be purchased by the United States or reserved for its use.

Act of May 27, 1908, c. 199, 35 Stat. 312:

An Act for the removal of restrictions from part of the lands of allottees of the Five Civilized Tribes, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from

and after sixty days from the date of this Act the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows: All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood including minors shall be free from all restrictions. All lands, except homesteads, of said allottees enrolled as mixed-blood Indians having half or more than half and less than three-quarters Indian blood shall be free from all restrictions. All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood, including minors of such degrees of blood, and all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, *shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one,* except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. The Secretary of the Interior shall not be prohibited by this Act from continuing to remove restrictions as heretofore, and nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this Act. * * *. (Italics supplied.)

SEC. 2. That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have

not been removed may be leased by the allottee if an adult, or by guardian or curator under order of the proper probate court if a minor or incompetent, for a period not to exceed five years, without the privilege of renewal: *Provided,* That leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise: * * *.

* * * * *

SEC. 4. *That all land from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes: Provided,* That allotted lands shall not be subjected or held liable, to any form of personal claim, or demand, against the allottees arising or existing prior to the removal of restrictions, other than contracts heretofore expressly permitted by law. (Italics supplied.)

* * * * *

SEC. 9. That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: * * *.

Act of May 10, 1928, c. 517, 45 Stat. 495–496:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the restrictions against the alienation, lease, mortgage, or other encumbrance of the lands allotted to members of the Five Civilized

Tribes in Oklahoma, enrolled as of one-half or more Indian blood, be, and they are hereby, extended for an additional period of twenty-five years commencing on April 26, 1931: *Provided,* That the Secretary of the Interior shall have the authority to remove the restrictions, upon the applications of the Indian owners of the land, and may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe.

* * * * *

SEC. 3. That all minerals, including oil and gas, produced on or after April 26, 1931, from restricted allotted lands of members of the Five Civilized Tribes in Oklahoma, or from inherited restricted lands of full-blood Indian heirs or devisees of such lands, shall be subject to all State and Federal taxes of every kind and character the same as those produced from lands owned by other citizens of the State of Oklahoma; and the Secretary of the Interior is hereby authorized and directed to cause to be paid, from the individual Indian funds held under his supervision and control and belonging to the Indian owners of the lands, the tax or taxes so assessed against the royalty interest of the respective Indian owners in such oil, gas, and other mineral production.

SEC. 4. That on and after April 26, 1931, the allotted, inherited, and devised restricted lands of each Indian of the Five Civilized Tribes in excess of one hundred and sixty acres shall be subject to taxation by the State of Oklahoma under and in accordance with the laws of that State, and in all respects as unrestricted and other lands:

Provided, That the Indian owner of restricted land, if an adult and not legally incompetent, shall select from his restricted land a tract or tracts, not exceeding in the aggregate one hundred and sixty acres, to remain exempt from taxation and shall file with the superintendent for the Five Civilized Tribes a certificate designating and describing the tract or tracts so selected: *And provided further,* That in cases where such Indian fails, within two years from date hereof, to file such certificate, and in cases where the Indian owner is a minor or otherwise legally incompetent, the selection shall be made and certificate prepared by the superintendent for the Five Civilized Tribes; * * *: *Provided,* That the tax exemption shall not extend beyond the period of restrictions provided for in this Act: *And provided further,* That the tax-exempt land of any such Indian allottee, heir, or devisee shall not at any time exceed one hundred and sixty acres.

SEC. 5. That this Act shall not be construed to reimpose restrictions heretofore or hereafter removed by the Secretary of the Interior or by operation of law, nor to exempt from taxation any lands which are subject to taxation under existing law.

Act of January 27, 1933, c. 23, 47 Stat. 777:

* * * That all funds and other securities now held by or which may hereafter come under the supervision of the Secretary of the Interior, belonging to and only so long as belonging to Indians of the Five Civilized Tribes in Oklahoma of one-half or more Indian blood, enrolled or unenrolled, are hereby declared to be restricted and shall remain subject to the jurisdiction of the said Secretary until April 26, 1956, subject to

expenditures in the meantime for the use and benefit of the individual Indians to whom such funds and securities belong, * * * *And provided further,* That all minerals, including oil and gas, produced from said land so acquired shall be subject to all State and Federal taxes as provided in section 3 of the Act approved May 10, 1928 (45 Stat. L. 495).

* * * * *

S. J. Res. No. 167, 72d Cong., 1st Sess., to carry out certain obligations to certain enrolled Indians under tribal agreement (c. 65, 47 Stat. 807):

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That any person duly enrolled as a member of an Indian tribe who received in pursuance of a tribal treaty or agreement with the United States an allotment of land which by the terms of said treaty or agreement was exempted partially or in total from taxation, and from which land the restrictions have been or have not been removed and who was required or permitted contrary to law to pay any illegal or unauthorized Federal inheritance tax or Federal income tax on the rents, royalties, or other gains arising from such alloted lands, and who under the law and rulings of the Treasury Department have secured a refund of the taxes so illegally or erroneously collected but who did not receive interest on such refunds in accordance with the laws and the regulations in force at the time the refund was secured and who have failed to file a claim for the allowance of such interest, shall be allowed one year after the approval of this Act within which to file such claim, and if otherwise entitled thereto may recover such interest on such illegally col-

lected taxes in the same manner and to the same extent as if such claims for interest had been theretofore duly filed as required by law, it not being the policy of the Government to invoke or plead a statute of limitations to escape the obligations of agreements solemnly entered into with its Indian wards: * * *

APPENDIX C

Regulations of the Secretary of the Interior Promulgated July 7, 1925, Governing Leasing and Removal of Restrictions on Land of Members of the Five Civilized Tribes

ROYALTIES

* * * * *

29. * * * That the said superintendent or other officer in charge of the office of the Superintendent for the Five Civilized Tribes is authorized in his discretion, where considered for the best interest of any adult, minor, or incompetent lessor, or his or her heirs, for whose account royalties, rents, or payments accruing under any lease have been paid to said superintendent, to withhold the disbursement of such royalties, rents, or payments, wholly or in part, from any such adult or guardian or curator of any such minor or incompetent, or his or her heirs, until such time or times as the payment thereof is considered best for the benefit of said lessor or his or her heirs.

And provided further, That in such individual cases or classes of cases as the Secretary of the Interior may direct the Superintendent for the Five Civilized Tribes shall cause such payments as may be authorized to be made out of the royalties and other individual Indian funds of the restricted Indians, minors, and incompetents, to be paid direct to the Indians entitled thereto

or to be otherwise paid out for their benefit and use, as the Secretary of the Interior may authorize in said cases. * * *

REMOVAL OF RESTRICTIONS

* * * * * *

1. Adult members of the Five Civilized Tribes whose allotments cannot be sold or encumbered except after removal of restrictions therefrom by the Secretary of the Interior provided by the above-quoted provisions of law, and who desire to have the restrictions removed from all or part of such allotment, shall apply to the Superintendent for the Five Civilized Tribes, through the field clerk of the district in which the applicant resides; the application to be made in duplicate on forms which have been prescribed and will be furnished free of charge on application to the Superintendent for the Five Civilized Tribes or any field clerk.

2. When an application is received by the field clerk, he shall, after investigation, including a personal interview with the applicant, forward the application with report and recommendation to the Superintendent for the Five Civilized Tribes to be transmitted with his report and recommendation for such action as the Secretary of the Interior may deem proper.

3. If the Secretary of the Interior finds that any applicant for the removal of restrictions should have the unrestricted control of his allotment or a part thereof, he will remove the restrictions wholly or in part from the allotment or a part thereof without conditions concerning terms of sale and disposal of the proceeds.

4. When, however, the Secretary of the Interior finds it to be for the best interest of any applicant that all or part of his restricted lands should be sold with conditions concerning terms of sale and disposal of the proceeds, he will remove the restrictions, to become effective only and simultaneously with the execution of deed by said applicant and issue an order specifically providing the terms under which the land may be sold and providing for the disposal of the proceeds.

* * * * * *

8. All moneys received by the said cashier for the Five Civilized Tribes or his successor in authority as consideration for land, including moneys received on account of deferred payments and accrued interest thereon, shall be deposited or held to the credit of the proper allottee in individual Indian accounts, and be subject to the rules, regulations, and orders of this department governing the holding of moneys so deposited and the disbursement thereof.

* * * * *

11. In all cases where purchases of automobiles, horses, wagons, buggies, cattle, agricultural implements, or other personal property are made for individual Indians, payments for which are made from moneys received from the sale of restricted allotted lands, or from other moneys held under the control of the Department of the Interior, the Superintendent for the Five Civilized Tribes will, when in his judgment it is to the Indians' best interest, cause bill of sale to be executed by the vendor or vendors conveying property purchased to the United States, to be held in trust for the use and

benefit of the respective allottees or their heirs who are of the restricted class.

* * * * *

15. In any case where lands are purchased for the use and benefit of any citizen of the Five Civilized Tribes of the restricted class, payment for which is made from proceeds arising from the sale of restricted allotted land or other moneys held under the control of the Department of the Interior, the Superintendent for the Five Civilized Tribes shall cause conveyance of such lands to be made on form of conveyance containing an habendum clause against alienation or encumbrance until April 26, 1931, * * *.

U. S. GOVERNMENT PRINTING OFFICE: 1939

SUPREME COURT OF THE UNITED STATES.

No. 817.—October Term, 1934.

Superintendent of Five Civilized Tribes, for Sandy Fox, Creek No. 1263, Petitioner,
vs.
Commissioner of Internal Revenue.

On Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[May 20, 1935.]

Mr. Justice McReynolds delivered the opinion of the Court.

Sandy Fox, for whom this suit was instituted, is a full-blood Creek Indian. Certain funds, said to have been derived from his restricted allotment, in excess of his needs were invested. The proceeds therefrom were collected and held in trust under direction of the Secretary of Interior. The question now presented is whether this income was subject to the Federal tax laid by the 1928 Revenue Act (c. 852, Secs. 11, 12; 45 Stat. 791). The Commissioner, the Board of Tax Appeals and the court below answered in the affirmative.

Petitioner maintains that the court should have followed the rule which it applied in *Blackbird* v. *Commissioner*, 38 F. (2d) 976; also that it erroneously held Congress intended to tax income derived from investment of funds arising from restricted lands belonging to a full-blood Creek Indian.

Blackbird, restricted full-blood Osage, maintained that she was not subject to the Federal income tax statute. The court sustained that view and declared:—

> "Her property is under the supervising control of the United States. She is its ward, and we cannot agree that because the income statute, Act of 1918 (40 Stat. 1057) and Act of 1921 (42 Stat. 227), subjects 'the net income of every individual' to the tax, this is alone sufficient to make the Acts applicable to her. Such holding would be contrary to the almost unbroken policy of Congress in dealing with its Indian wards and their affairs. Whenever they and their interests

have been the subject affected by legislation they have been named and their interests specifically dealt with."

This does not harmonize with what we said in *Choteau* v. *Burnet* (1931), 283 U. S. 691, 693, 696:—

> "The Language of §§ 210 and 211 (a) [Act 1918] subjects the income of 'every individual' to tax. Section 213 (a) includes income 'from any source whatever'.[1] The intent of Congress was to levy the tax with respect to all residents of the United States and upon all sorts of income. The Act does not expressly exempt the sort of income here involved, nor a person having petitioner's status respecting such income, and we are not referred to any other statute which does. . . . The intent to exclude must be definitely expressed, where, as here, the language of the Act laying the tax is broad enough to include the subject matter".

The court below properly declined to follow its quoted pronouncement in Blackbird's case. The terms of the 1928 Revenue Act are very broad, and nothing there indicates that Indians are to be excepted. See *Irwin* v. *Gavit*, 268 U. S. 161; *Heiner* v. *Colonial Trust Co.*, 275 U. S. 232; *Helvering* v. *Stockholms, etc. Bank*, 293 U. S. 84; *Pitman* v. *Commissioner*, 64 F. (2d) 740. The purpose is sufficiently clear.

It is affirmed that "inalienability and nontaxability go hand in hand; and that it is not lightly to be assumed that Congress intended to tax the ward for the benefit of the guardian".

The general terms of the taxing act include the income under consideration and if exemption exists it must derive plainly from agreements with the Creeks or some Act of Congress dealing with their affairs.

Neither the Creek agreement of 1901, nor the supplemental agreement (1902) conferred general exemption from taxation upon Indians; homesteads only were definitely excluded, although alienation of alloted lands was restricted.

The suggestion that exemption must be inferred from the Act of April 26, 1906 (34 Stat. 137) or May 27, 1908 (35 Stat. 312) is not well founded. The first of these extended restrictions upon

[1] Like provisions are in Secs. 210 and 211 (a) Rev. Acts 1921, 1924, 1926, and Secs. 11 and 12 (a) Act of 1928; Sec. 213 (a) Acts 1921, 1924, 1926 and Sec. 22 Act of 1928.

the alienation of allotments for twenty-five years unless sooner removed by Congress, and provided: "Sec. 19. . . . That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee". This exemption related to land and not to income derived from investment of surplus income from land. Moreover, the Act itself was superseded by the second one which did not contain the quoted provision, but declared: "Sec. 4. That all lands from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes . . .".

We find nothing in either act which expresses definite intent to exclude from taxation such income as that here involved. See *Shaw* v. *Oil Corp.*, 276 U. S. 575, 581.

Nor can we conclude that taxation of income from trust funds of an Indian ward is so inconsistent with that relationship that exemption is a necessary implication. Nontaxability and restriction upon alenation are distinct things. *Choate* v. *Trapp*, 224 U. S. 665, 673. The taxpayer here is a citizen of the United States, and wardship with limited power over his property does not, without more, render him immune from the common burden.

Shaw v. *Oil Corp., supra*, held that restricted land purchased for a full-blood Creek—ward of the United States—with trust funds was not free from state taxation, and declared that such exemption could not be implied merely because of the restrictions upon the Indian's power to alienate.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.